

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912. *20*

No. ~~52~~ 172

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN
PACIFIC RAILWAY COMPANY, APPELLANTS,

vs.

ALRA G. FARRELL.

TRANSCRIPT FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

FILED - SEPTEMBER 10, 1912.

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(27,292)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 537.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN
PACIFIC RAILWAY COMPANY, APPELLANTS,

vs.

ALRA G. FARRELL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

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No.

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

ALRA G. FARRELL, SUBSTITUTED FOR
BELDON M. DELANY,
Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, A
CORPORATION, AND NORTHERN PA-
CIFIC RAILWAY COMPANY, A CORPORA-
TION,
Appellees.

Transcript of the Record

*Upon appeal from the United States District Court
for the District of Idaho, Northern Division.*

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

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Spokane, Washington,

For Northern Pacific Railway Co.

In the District Court of the United States for the District of Idaho, Northern Division.

ALRA G. FARRELL, SUBSTITUTED FOR
BELDON M. DELANEY,

Plaintiff,
vs.

EDWARD RUTLEDGE TIMBER COMPANY, A CORPORATION, AND NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION,

Defendants.
No. 660.

STIPULATION.

It is hereby stipulated and agreed by and between counsel for the respective parties to the above entitled action, that Alra G. Farrell, plaintiff herein, may serve and file herein, unless objection thereto is made by the Court, her amended complaint hereto attached, which amended complaint shall supersede the original complaint herein for all purposes of this action.

Dated this 16th day of October, 1917.

A. H. KENYON,
S. M. STOCKSLAGER,
Attorneys for Plaintiff.

STILES W. BURR,
SKUSE & MORRILL,
Attorneys for Edward
Rutledge Timber Com-
pany, Defendant.

CANNON & FERRIS,
Attorneys for Defendant
Northern Pacific
Railway Company.

Approved,
Dietrich, Judge.
Oct. 31, 1917.

(Title of Court and Cause.)

No. 660.

AMENDED COMPLAINT.

Plaintiff complains of the defendants and alleges:

I.

That the defendant Edward Rutledge Timber Company, is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in the City of Spokane, Washington, and is a citizen of the State of Washington.

II.

That at all times herein mentioned the Northern Pacific Railway Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen of the State of Wisconsin.

III.

That at all times herein mentioned Beldon M. Delany was and until the time of his death a citizen of the United States, over the age of twenty-one years, and a citizen and resident of the State of Idaho, residing upon the land hereinafter described, in Shoshone,

shone County, Idaho, and at all of said times was duly qualified to enter and acquire title to one hundred and sixty acres of land, more or less, under the homestead laws of the United States.

IV.

That on or about the 1st day of April, 1901, one W. B. Leach located and settled upon the Northeast Quarter (NE $\frac{1}{4}$) of Section Twenty (20), Township Forty-three (43), North, Range Four (4) E. B. M., then unsurveyed public lands of the United States, situated in the County of Shoshone, and State of Idaho, and within the Coeur d'Alene Land District, with the intention of then establishing and continuously thereafter maintaining his home thereon, and with the intention of entering same under the homestead laws of the United States when the said land should have been duly surveyed and open to entry under said laws, and thereafter continuously resided upon said land, cultivated and improved the same to and until the 21st day of June, 1903; that on or about the 21st day of June, 1903, Beldon M. Delany herein having purchased and secured the possessory right and right of possession of the said W. B. Leach in and to the land and premises hereinbefore described, located and settled and established his home thereon with the intention of thereafter maintaining his home thereon with the intention of entering the same under the homestead laws of the United States when the said land should have been duly surveyed and open to entry under said laws, and from said time until the date of his death, continuously re-

sided upon said land, cultivated and improved the same.

V.

That at the time of the location and settlement of the said W. B. Leach and Beldon M. Delany upon the land above described, the same was vacant, unoccupied and unsurveyed public lands of the United States, and no claim or right of title to or interest in the said lands and premises or any part thereof had then been made by any person, persons or corporations whomsoever, nor was there any evidence whatsoever upon the said lands and premises or any part or parcel thereof, nor in the United States Land Office for the District in which said land was situated, to-wit: The Coeur d'Alene District, nor in the General Land Office at Washington, D. C., showing any right, title, or interest by, of or for any person, persons or corporations whomsoever to the said lands and premises or any part or parcel thereof, nor were there any marks, blazes, notices or other evidence whatsoever of the location, selection, claim or possession of the said premises located or traced upon the ground, or upon or near the same or any part thereof, nor had the boundaries thereof been traced or located by reference to any natural objects or permanent monuments, or marked or located by any monument of any kind or character whatsoever, and no person had prior to the location and settlement of the said W. B. Leach and Beldon M. Delany upon said lands, nor since said settlement and to date hereof, ever entered upon the same or attempted

to locate or reside thereon, nor any part or parcel thereof.

VI.

That on or about the 5th day of July, 1901, the Governor of the State of Idaho for and on behalf of the State of Idaho, duly made and filed with the United States Surveyor General for the State of Idaho the application of said State for the survey of Township 43 North, Range 4, E. Boise Meridian, (with other lands) and thereafter and on or about the 8th day of July, 1901, duly filed said application with the Commissioner of the General Land Office pursuant to the Act of August 18th, 1894, for the purpose of withdrawing the said lands from settlement or appropriation and of securing to said State the preference right of selection of said lands as provided by the terms of said Act and thereafter duly caused notice thereof to be published in the manner provided by said Act. That upon the filing of said application the said lands became and were withdrawn from the public domain and reserved from appropriation and were not subject to entry or appropriation by any person or corporation other than the State of Idaho to and until sixty (60) days from the date of the filing of Township plat of survey in the proper District Land Office.

VII.

That on the 4th day of June, 1909, the official plat of survey of the land and premises hereinbefore described was filed in the local land office at Coeur d'Alene City, Idaho, and on said date said lands first

became open for entry under the homestead laws of the United States, and on said date the said Beldon M. Delany duly made application to enter said lands in the manner and form required by law under the homestead laws of the United States, which said application was rejected by the local land office on the ground and for the reason only that the said application was in conflict with the selection theretofore made by the State of Idaho for indemnity school purposes, and with lieu selection list No. 71 theretofore made by the Northern Pacific Railway Company under the Act of March 2nd, 1899.

VIII.

That thereafter Beldon M. Delany appealed from said decision and ruling of the land office, and thereafter and on July 9th, 1915, the Commissioner of the General Land Office held that said Beldon M. Delany had no right to enter the said lands under the homestead laws of the United States upon the date of his alleged settlement, nor at the time he filed application to enter the same under the homestead laws of the United States, for the reason that the said lands had been duly selected by the Northern Pacific Railway Company, defendant herein.

IX.

That thereafter the said Beldon M. Delany duly appealed from the said decision of the Commissioner of the General Land Office to the Department of the Interior in the manner required by law, and thereafter and on the 18th day of November, 1915, the Department duly affirmed the decision of the Com-

missioner of the General Land Office so appealed from as aforesaid, and remanded the case with directions that Delany's application to enter be finally rejected upon the ground and for the reason that Delaney's application to enter the land under the homestead laws of the United States was based upon a settlement not made until after the Northern Pacific Railway Company had filed its selection list No. 71, Coeur d'Alene 02484 for the same land under the Act of March 2nd, 1899.

X.

That thereafter said Beldon M. Delany duly filed a motion for re-hearing of the decision last above mentioned, and thereafter and on the 29th day of January, 1916, the motion for re-hearing of said matter was denied on the grounds hereinbefore set forth, and thereafter said Beldon M. Delany duly filed a petition for the exercise of the supervisory power of the Hon. Secretary of the Interior to vacate and recall departmental decisions of November 18th, 1915, and January 29th, 1916; that thereafter the Hon. Secretary of the Interior denied said petition of Beldon M. Delany on the ground that prior to the settlement of Beldon M. Delany the Northern Pacific Railway Company had duly selected the lands under the act of March 2nd, 1899, and that notwithstanding that the said Northern Pacific Railway Company had in its lieu selection list No. 71, described the said lands in terms of future survey when made, and the case was finally closed.

XI.

That on the 23rd day of July, 1901, the Northern Pacific Railway Company filed with the General Land Office its selection list No. 71, which said list contained the following pretended description, to-wit:

"Lands, which when surveyed, will be the Northeast Quarter of Section 20, Township 43 North, Range 4, E. B. M."

That at the time of filing said selection list No. 71 said pretended description was wholly imaginary, and no lands in the State of Idaho or elsewhere were or could be so designated or described, for the reason that at the time of filing same as aforesaid, no survey had been made or attempted, nor were there any surveyed lands in such close proximity thereto as to render such description and designation of said lands definite or certain or capable of being made definite or certain by any reasonable manner or in any other manner or at all, save and except the making of an official survey by the proper officers of the United States.

XII.

That neither the said Northern Pacific Railway Company, or any of its servants, agents, attorneys, or employees knew or pretended to know what lands were referred to in said pretended description, nor did said defendant then know that in the event of a survey thereafter that said pretended description would be applied to the lands and premises now oc-

cupied and claimed by this plaintiff as aforesaid, and which said pretended description was the sole and only description contained in said lieu selection list No. 71, and which said description was then and is wholly insufficient to locate and describe the lands and premises hereinbefore described and located and settled upon by said Beldon M. Delany as hereinbefore alleged, or any part or parcel thereof, or any land in the State of Idaho or elsewhere, for want of which description the said lieu selection list No. 71, and the selection of the said lands by the Northern Pacific Railway Company was and is wholly void and of no force or effect whatsoever.

XIII.

That at the time of the filing of said lieu selection list No. 71 by the said Northern Pacific Railway Company as aforesaid the said lands had been theretofore duly appropriated by the State of Idaho and at said time were withdrawn from the public domain and were not open to selection or appropriation by the Northern Pacific Railway Company under the Act of March 2nd, 1899, or in any manner or at all, and by reason of the making and filing of the prior application of the State of Idaho of the lands as hereinbefore alleged, the attempted selection thereof by the Northern Pacific Railway Company was void and of no force or effect.

XIV.

That thereafter and on the 16th day of June, 1916, letters patent to said land were issued to the

Northern Pacific Railway Company, a corporation, defendant herein.

XV.

Plaintiff is informed and believes, and therefore alleges the fact to be, that subsequent to the 16th day of June, 1916, and prior to the commencement of this action, the Northern Pacific Railway Company, a corporation, transferred and caused to be transferred to the defendant Edward Rutledge Timber Company, a corporation, all of its right, title and interest in and to the lands and premises hereinbefore described, and the said Edward Rutledge Timber Company, a corporation, now claims to be the owner of the legal title of the land and premises above described.

XVI.

That neither the said Northern Pacific Railway Company, a corporation, or the said Edward Rutledge Timber Company, a corporation or any agent, servant, attorney, or employee whomsoever or either of said defendants have ever been in possession of the said land and premises or any part or parcel thereof, but the possession thereof since the 1st day of April, 1901, has been and is now in this plaintiff and her predecessor in interest to the exclusion of all other person, persons, or corporation whomsoever; that neither of said defendants have ever complied with the laws of the United States so as to entitle them or either of them to claim any interest in or right or title to the said lands and premises or any part or parcel thereof as against this plaintiff.

XVII.

That the action and decision of the local land office rejecting the application of Beldon M. Delany to enter upon the land and premises hereinbefore described under the homestead laws of the United States on the 4th day of June, 1909, was and is contrary to law, and in violation of the rights of this plaintiff, and the approval of said decision rejecting said application of the said Beldon M. Delany by the Commissioner of the General Land Office, and the approval thereof by the Secretary of the Interior, were and are wrongful and unlawful and based upon an erroneous construction of the law, and upon a statement of facts upon and concerning which there was and is no conflict.

XVIII.

That long prior to the said 16th day of June, 1916, and on said date, and at the time of the issuance of the patent to the Northern Pacific Railway Company, a corporation, to the land and premises herein described, said Beldon M. Delany was and at all times since has been and at the time of the commencement of this action was, the owner and lawfully entitled to a patent for the legal title to said premises and each and every part thereof.

XIX.

That each and every, all and singular of the acts of the defendants herein and each of them of and concerning their attempted selection and claim in and to said land and premises, and all the acts and proceedings of the Commissioner of the General

Land Office and the Secretary of the Interior in connection therewith, and in the issuance of said patent are and were contrary to and without authority at law, and in violation of the rights of this plaintiff, and that at the time of the pretended initiation of said claim on the part of the Northern Pacific Railway Company, in and to said lands and premises, the said Northern Pacific Railway Company was wholly without any right or authority at law to select or claim the said land or any part thereof.

XX.

That subsequent to the commencement of this action the said Beldon M. Delany, the party instituting this suit as plaintiff, herein, died, leaving him surviving as his sole and only heirs at law three sisters and one brother, and that all of said heirs have conveyed all of their right, title and interest in and to the said premises herein described to Alra G. Farrell, one of said heirs. That the said Alra G. Farrell is now the only party interested in said land and premises and the sole and only person in interest as plaintiff in this action.

WHEREFORE, plaintiff prays that if she be adjudged and decreed to be the owner of the lands and premises herein described and entitled to the possession thereof, and in the possession thereof, and that the defendants and each of them be decreed to hold such title as they may possess under the patent of the United States in and to said premises in trust for this plaintiff, and for the sole use and behoof of

this plaintiff, and that they be decreed to convey the same to this plaintiff by proper deed of conveyance and that the title thereto be forever quieted in this plaintiff, and for her costs and disbursements in this action expended, and for such other and further relief in the premises as to the Court may seem equitable and just.

A. H. KENYON,
S. M. STOCKSLAGER,
Solicitors for Plaintiff.

(Duly verified).

Endorsed, Filed Oct. 30, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

ANSWER OF DEFENDANT NORTHERN PACIFIC RAILWAY COMPANY TO AMENDED BILL OF COMPLAINT.

Comes now the defendant, Northern Pacific Railway Company, and for its answer to the amended bill of complaint of the substituted plaintiff Alra G. Farrell, says:

1. This defendant admits that it is and was at all the times mentioned in the amended bill of complaint (hereinafter, for brevity, referred to as "the bill") a corporation organized and existing under the laws of the State of Wisconsin; and alleged that previous to the times mentioned in the bill this defendant had in all things duly complied with all the conditions and requirements of the constitution and

laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that this defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

2. This defendant admits that the defendant, Edward Rutledge Timber Company, is and was at all times mentioned in the bill a corporation organized and existing under the laws of the State of Washington, with its principal place of business in the City of Spokane in said State; and on information and belief alleges that previous to the times mentioned in the bill the defendant Edward Rutledge Timber Company had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that said defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

3. This defendant has no knowledge or information sufficient to form a belief as to whether, at any of the times mentioned in the bill or at the time of his death Beldon M. Delaney was a citizen of the United States, or was over the age of twenty-one years, or was qualified to enter or acquire title to

one hundred sixty (160) acres of land, more or less, under the homestead laws of the United States; or as to whether said Delaney ever resided upon the land described in the bill.

4. This defendant has no knowledge or information sufficient to form a belief as to whether W. B. Leach, named in the bill, located or settled upon the land described in the bill, viz: the Northeast quarter of Section 20, in Township 44 North, Range 4 East, B. M., or upon any part thereof, on or about the first day of April, 1901, or at any other time; or as to whether, if said Leach ever located or settled on said land, he did so with the intention of establishing or maintaining his home thereon, or with the intention of entering the same under the homestead laws of the United States; or as to whether he thereafter continuously or otherwise resided upon said land or cultivated or improved the same.

5. This defendant admits that the approved township plat of survey of the township in which the land described in the bill is situated, was not filed in the United States District Land Office at Coeur d'Alene, Idaho, which is the District in which said land is located, until the fourth day of June, 1909, and that until said date said land was unsurveyed; but alleges that long prior to said date the said land had been surveyed in the field by the official surveyors of the United States under the direction of the Surveyor General and the Commissioner of the General Land Office; that the lines of survey and the boundaries of said tract of land were properly

and plainly marked upon the land by monuments, blazes and other marks; that the said survey so made was thereafter approved by the Surveyor General of the United States and the Commissioner of the General Land Office according to law; and that the lines of survey so traced and marked are identical with the lines of survey shown on the township plat of survey filed as aforesaid.

6. This defendant has no knowledge or information sufficient to form a belief as to whether said Delaney acquired or purchased any alleged right or rights of said Leach, possessory or otherwise, in or to said land, or whether said Delaney ever located or settled on said land or established his home thereon, or whether if said Delaney ever located or settled on said land, he did so with the intention of thereafter maintaining his home thereon or with the intention of entering the same under the homestead laws of the United States, or whether he thereafter, continuously or otherwise, resided upon said land or cultivated or improved the same or was residing thereon at the time of his death. And this defendant further specifically denies each and every allegation contained in paragraph 4 of the bill.

7. This defendant admits and alleges that on and prior to the first day of April, 1901, and at all times thereafter until the twenty-third day of July, 1901, the said land was vacant, unoccupied and unsurveyed public land of the United States, and that no claim, right or title to or interest in the said land or any part thereof had attached or been initiated

by any person or corporation whomsoever; but denies that at any time after the twenty-third day of July, 1901, the said land was vacant, unoccupied or unappropriated public land of the United States, or free from claim, right or title; and denies that at the time of the alleged location or settlement thereon by said Delaney or at any time after the twenty-third day of July, 1901, there was no evidence upon the said land or in the United States Land Office for the district in which said land was situated, to-wit: in the United States District Land Office at Coeur d'Alene, Idaho, or in the General Land Office at Washington, D. C., to show that said land was claimed by this defendant, or by the defendant Edward Rutledge Timber Company, or that the boundaries of said land had not then been traced, marked or located by monuments, or that there were no marks, blazes, notices or other evidences of the location, selection, claim or possession of said land located or traced upon the ground; and this defendant alleges that, on the contrary, the said land was at all times subsequent to the twenty-third day of July, 1901, segregated from the public domain and appropriated by the selection thereof made by the defendant Railway Company as hereinafter set forth, and was therefore not open or subject to any other appropriation, entry or claim, or open to settlement by said Delaney or any other person, under the homestead laws of the United States or otherwise; that the fact of such selection, appropriation and segregation was a matter of record and ap-

peared upon the fact of the records of the said United States District Land Office at Coeur d'Alene, Idaho, and upon the face of the records of the General Land Office at Washington, D. C., the same being the usual, proper and only legal records upon which such selection, appropriation and segregation could appear; that at the time said Delaney first went upon said land, and at the time of his alleged location and settlement thereon, and at all times thereafter, said Delaney had full knowledge and notice of the selection of said land by the defendant Railway Company as hereinafter set forth, and of the segregation and appropriation of said land by virtue of such selection; that said Delaney went upon said land and made his alleged settlement thereon, and thereafter occupied the same and made application to enter the same under the homestead laws, and endeavored to acquire title thereto, not in good faith, but well knowing of the defendant Railway Company's prior selection thereof, and of the defendant Edward Rutledge Timber Company's right thereunder, and in the hope that the claim of these defendants to the land might be defeated upon technical grounds, and that he, said Delaney, might acquire said land and the valuable timber thereon for purposes of speculation.

8. This defendant denies that said Delaney ever attempted, in good faith, to establish a residence on said land or to make his home thereon, or endeavor in good faith or otherwise, to comply with the homestead laws of the United States, or to acquire the

said land or any part thereof as his home; and alleges that, on the contrary, the said land is and always has been principally, if not wholly, valuable for the timber thereon; that the same is rough and unfertile and of substantially no value for agricultural purposes; and that said Delaney went upon the same and endeavored to acquire title thereto, not with the intent of making a home thereon, but with intent to acquire the valuable timber thereon for speculative purposes.

9. This defendant admits that at some time subsequent to the 5th day of July, 1901, the Governor of the State of Idaho attempted to make an application, under the Act of Congress approved August 18th, 1894, for the survey of the township mentioned in paragraph 6 of the bill and a large number of other townships in the State of Idaho. But this defendant denies that such application, or purported application, was duly made, or made in accordance with the provisions of said act; and denies that such purported application was made to the Commissioner of the General Land Office, as required by the terms of said act; and denies that said purported application was made on or about the 5th day of July, 1901, or was filed in the office of the Commissioner of the General Land Office on or about the 8th day of July, 1901; and denies that the said Governor, or any other person, thereafter, duly or otherwise, caused notice thereof to be published in the manner provided by said act; and denies that upon the filing of said purported application the lands

described therein, or any thereof, became or were withdrawn from the public domain, or reserved from appropriation, or were not subject to entry or appropriation by any person or corporation other than the State of Idaho, to and until sixty (60) days from the date of the filing of the township plat of survey, or for any other period of time whatsoever.

10. This defendant alleges that at some time after the 5th day of July, 1901, the then Governor of the State of Idaho made and signed a writing purporting to be an application, under the said Act of August 18, 1894, for the survey of the townships referred to in the last preceding paragraph of this answer, which purported application was addressed to the Surveyor General for the State of Idaho and to the Commissioner of the General Land Office, and was by said Governor or at his instance, filed in the office of the Surveyor General at Boise, Idaho; that said Surveyor General thereafter transmitted said purported application to the Commissioner of the General Land Office, by mail, and the same was received in the office of the Commissioner of the General Land Office on or after, and not before, the 15th day of July, 1901; that after the receipt of said purported application the Commissioner of the General Land Office duly considered the same and held and decided that such application was excessive, improvident, illegal, and without effect, and that the same was not entitled to be recognized or allowed, and ordered that the same be rejected; that the said Gover-

nor was duly notified of such action by the Commissioner of the General Land Office; that no appeal from said order and decision of the said Commissioner, nor any motion of other action for the review, reversal or modification of the same, was ever taken by or on behalf of the State of Idaho; that said order and decision of said Commissioner was never revoked, modified or set aside, but at all times remained in force and effect; that the Commissioner of the General Land Office never gave notice to the Surveyor General, as required by the provisions of said Act of August 18, 1894, of the said purported application; and never, at any time prior to the month of January, 1905, gave notice to the Local Land Office of any of the districts in which the townships described in said application were situated, or to the Local Land Office at Coeur d'Alene, Idaho, of the said application or of the reservation of said townships, or any of them, as required by said act; that said purported application was wholly void and without effect; and that the Commissioner of the General Land Office and the Secretary of the Interior, in the proper exercise of the authority vested in each of them by law, have frequently and in a number of cases held that said purported application was and is illegal, void and without effect, and inoperative to effect a reservation or withdrawal of the townships therein described, or of any land situated in either of said townships, or to create any preference or other right in the State of Idaho, or to continue or create an obstacle to the selection or

other appropriation of any land in either of said townships by the defendant Railway Company, or any other person or corporation, or to any other claim to any of said lands under the public land laws of the United States, initiated or attaching prior to the filing of the township plat of survey of any such township. This defendant further alleges that the State of Idaho never made any valid selection or application to select the land described in the bill, or any part thereof, either before or after filing of the township plat of survey; and that the State of Idaho does not now claim or assert any right, title or interest in or to the said land or any part thereof.

11. This defendant alleges that on the 23rd day of July, 1901, the land described in the bill was un-surveyed public land of the United States, non-mineral in character, not reserved, and to which no adverse right or claim had attached or been initiated; that the same was situated within the County of Shoshone and the State of Idaho, through which the railroad of the Northern Pacific Railroad Company was constructed and through which the same had been operated by said Railroad Company and by the defendant Railway Company, as its successor, and was then being operated by the defendant Railway Company; that said land was so classified as non-mineral at the time of actual Government survey; that on said 23rd day of July, 1901, the defendant Railway Company by its selection list No. 71, duly made selection of the said land under the provisions of the Act of Congress entitled "An Act to set aside

a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," approved March 2, 1899 (30 Stat. L. 993), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of said Act of Congress; that said selection was duly made by filing in the said United States Land Office at Coeur d'Alene, Idaho, a proper selection list or application to select, which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules, regulations, and practice established and approved by the Secretary of the Interior and the Commissioner of the General Land Office; that said selection list properly and accurately described said land so selected, in such manner as to designate the same with a reasonable degree of certainty, as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; that said selection list was in all respects regular and proper in form and substance, and that the same was duly accepted, approved and allowed by the Register and Receiver of the said United States Land Office.

12. This defendant alleges that on the 4th day of June, 1909, the official township plat of the survey of the township in which said land is situated, was filed in the said United States Land Office at Coeur d'Alene, Idaho, and that on said last men-

tioned date and within the time specified in said Act of Congress, the defendant Railway Company caused to be made and filed in said United States Land Office at Coeur d'Alene, Idaho, in accordance with the provisions of Section 5 of said Act, a new selection list embracing the selections embraced in the said selection list of July 23, 1901, including the selection of the land described in the bill describing the land so selected according to such survey; which said supplemental list was so made and filed in exact compliance and in accordance, in matters of form as well as substance, with the provisions of the said Act of Congress and the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office applicable to such selections.

13. This defendant admits that the said selection list No. 71 described the said land in the manner alleged in said bill, but alleges that said list was so filed in the United States Land Office at Coeur d'Alene, Idaho, and not in the General Land Office.

14. This defendant denies that at the time the defendant Railway Company's said selection list was so filed the description of said land contained in said selection list was imaginary, or that no land in the State of Idaho or elsewhere was or could be so designated or described, whether for the reason stated in the bill or otherwise; and denies that at that time there were no surveyed lands in such proximity to the lands so selected as to render such description and designation definite or certain, or capable of

being made definite or certain, in any reasonable manner, or save and except by the making of an official survey by the proper officers of the United States; and denies that neither the defendant Railway Company nor any of its servants, agents, attorneys or employees knew or pretended to know what lands were referred to by such description, or that the defendant Railway Company did not then know that upon survey, such description would be applied to the land described in said bill; and denies that the description contained in said selection list was insufficient to designate, locate or describe the land so selected, or that the said selection was by reason of insufficiency of description or otherwise, void or of no force or effect; but alleges that, on the contrary, in and by said selection list the said land was properly and sufficiently described, in such manner as to designate the same with a reasonable degree of certainty, in the manner prescribed and required by the said Act of Congress and by the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to selections under said Act.

15. This defendant denies that at the time the defendant Railway Company's said selection list was so filed the land described in the bill, or any part thereof, had theretofore been duly or otherwise appropriated by the State of Idaho, or at said or any other time was withdrawn from the public domain (except by virtue of such selection by defendant Railway Company); and denies that the same was

not then open to selection or appropriation by the defendant Railway Company under said act of March 2, 1899, or in any manner, or at all; and denies that by reason of the making and filing of the said or any application or purported application of the State of Idaho for the survey of the said land, as alleged in the bill or otherwise, the said selection thereof by the defendant Railway Company was void or of no force or effect.

16. This defendant admits and alleges that shortly after the township plat of survey was filed in said United States Land Office at Coeur d'Alene, Idaho, as hereinbefore set forth, but on the 10th day of June, 1909, and not on the 4th day of June, 1909, as alleged in the bill, said Delaney tendered to the Register and Receiver of said Land Office an application to enter the said land under the homestead laws of the United States; that such application was rejected by said Register and Receiver; and that thereafter the action of said Register and Receiver in so rejecting said application was confirmed by the Commissioner of the General Land Office and by the Secretary of the Interior; but this defendant has no knowledge or information sufficient to form a belief as to whether or not such application to enter said land was made by said Delaney in the form and manner required by law, or in compliance with the rules, regulations and practice of the General Land Office or of the Department of the Interior governing such applications; and alleges that the action of the said Register and Receiver in so rejecting such

application, and of the Commissioner of the General Land Office and the Secretary of the Interior in so confirming such rejection, was right and proper and in accordance with law, and not in violation of any right of said Delaney or of the plaintiff; and this defendant further denies that the decisions of said officers were based upon an erroneous construction of the law and upon a state of facts concerning which there was and is no conflict or dispute, and alleges, on the contrary, that the decisions of said officers were based upon questions of mixed law and fact.

17. This defendant alleges that neither in the proceedings in the said Coeur d'Alene Land Office, nor in the General Land Office, nor before the Secretary of the Interior upon the said application of said Delaney to enter said land, nor otherwise in connection with the same, was it ever at any time or in any manner claimed or asserted by or on behalf of said Delaney, or by any other person, that the alleged claim or rights of said Delaney rested upon anything which had occurred prior to his alleged settlement on said land on June 21, 1903, or upon the alleged settlement and location thereon by said Leach, or that any claim or right of any kind whatsoever had attached or been initiated to said land prior to the selection thereof by the defendant Railway Company on July 23, 1901, or that at the time of the selection of said land by the defendant Railway company on July 23, 1901, the same was not then vacant and

unappropriated public land of the United States subject to such selection.

18. This defendant alleges that the said selection so made by the defendant Railway Company of the land described in the bill, and the said selection lists so filed by it were thereafter duly approved and allowed by the Commissioner of the General Land Office and by the Secretary of the Interior, pursuant to and as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; and that thereafter, and at or about the time stated in the bill, a patent of the United States conveying the said land to the defendant Railway Company was duly issued, granted and delivered to the defendant Railway Company in accordance with law.

19. This defendant admits that it has conveyed the premises to the Edward Rutledge Timber Company, and alleges that said conveyance bears date July 17, 1916, and was made in pursuance of a contract between this defendant and said Edward Rutledge Timber Company dated October 5, 1903, whereby for valuable consideration paid to it by said defendant Edward Rutledge Timber Company, this defendant sold the land to said Edward Rutledge Timber Company and agreed and understood to convey the same; and this defendant admits that said Edward Rutledge Timber Company now claims to be the owner of the legal title to said land.

20. This defendant denies that neither the defendant Railway Company nor the defendant Ed-

ward Rutledge Timber Company, nor any agent, servant, attorney or employee of either of said defendants, have ever been in possession of said land or any part thereof; and denies that the plaintiff or said Delaney or his alleged predecessor in interest have been in possession of said land since the first day of April, 1910, to the exclusion of all other persons or corporations, or at all; and denies that the defendants have not complied with the laws of the United States so as to entitle them to claim said land as against said Delaney or the plaintiff; but alleges that, on the contrary, the defendant Railway Company has, in all respects, complied with all the laws of the United States and with the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office; and that by virtue of matters hereinbefore set forth the defendant Railway Company became and was entitled to the said land and entitled to receive patent therefor.

21. This defendant denies that any of the acts of proceedings of the defendant Railway Company concerning the said selection, or any of the acts or proceedings of the officers of the said Coeur d'Alene Land Office, or of the Commissioner of the General Land Office, or of the Secretary of the Interior in connection therewith, or in the issuance of patent to the defendant Railway Company as aforesaid are or were contrary to or without authority of law, or in violation of any rights of said Delaney or of the plaintiff; and denies that the rejection of said Delaney's said

application was wrongful or unlawful, or in violation of any right of said Delaney or of the plaintiff, or based upon an erroneous construction of the law, or upon a statement of facts concerning which there was and is no conflict; and alleges that all the acts and proceedings of the defendant Railway Company and of the officers of said Coeur d'Alene Land Office and of the Commissioner of the General Land Office and of the Secretary of the Interior in rejecting and confirming the rejection of said Delaney's said application and in approving the selection of said land by the defendant Railway Company and in issuing patent to it, were right and proper and in accordance with law.

2. This defendant denies that on the 16th day of June, 1916, or at the time of issuance of patent to the defendant Railway Company as aforesaid, or at any other time whatsoever, said Delaney or the plaintiff was the owner of said land or the holder of the legal title thereto or entitled to patent for the same; and denies that said Delaney or his heirs or other successors in interest or the plaintiff has or have now, or ever had, any right, title or interest whatsoever in or to the said land or any part thereof; and alleges that by virtue of its selection of the said land as hereinbefore set forth, and by virtue of the patent issued to it as aforesaid, the defendant Railway Company became and was the owner of said land in fee simple, free from any claim, right, title or interest of said Delaney or of the plaintiff or any other person whomsoever, except the defendant Edward Rutledge Tim-

ber Company; and that by virtue of the conveyance of said land by the defendant Railway Company, the defendant Railway Company, the defendant Edward Rutledge Timber Company became and it now is the owner of said land and all thereof in fee simple, free from any claim, right, title or interest of said Delaney or of the plaintiff or any other person whomsoever, except the defendant Edward Rutledge Timber Company; and that by virtue of the conveyance of said land by the defendant Railway Company, the defendant Edward Rutledge Timber Company became and it now is the owner of said land and all thereof in fee simple, free from any claim, right, title or interest to or in the same on the part of said Delaney or the plaintiff or any other person whomsoever.

23. Defendant admits that said Beldon M. Delaney, the party instituting this suit as plaintiff, died subsequent to the commencement of this suit but this defendant has no knowledge or information sufficient to form a belief as to whether said Delaney died testate or intestate, or as to whether he left any heirs at law; or as to who the heirs of said Delaney, if any, were or are; or as to whether the plaintiff, Alra G. Farrell, was or is an heir of said Delaney; or as to whether any heir of said Delaney has assigned, conveyed, or otherwise transferred to said plaintiff his supposed right, title or interest in the land described in the bill, or any thereof; or as to whether said plaintiff has in any manner acquired or succeeded to the supposed rights or interests in said land, or any

thereof, asserted or claimed by said Delaney.

WHEREFORE, this defendant prays that it be hence dismissed, with costs.

NORTHERN PACIFIC RAILWAY
COMPANY.

By R. H. RELF,

(Corporate Seal) Assistant Secretary.

CHAS. W. BUNN,

CANNON & FERRIS,

GRAFTON MASCN,

Solicitors and of Counsel for Defendant,
Northern Pacific Railway Co.

(Duly verified)

Endorsed, Filed Oct. 31, 1917.

W. D. McReynolds, Clerk,

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 660.

ANSWER OF DEFENDANT EDWARD RUTLEDGE TIMBER COMPANY TO AMENDED BILL OF COMPLAINT.

Comes now the defendant Edward Rutledge Timber Company, and for its answer to the amended bill of complaint of the substituted plaintiff, Alra G. Farrell, says:

1. This defendant admits that it is and was at all times mentioned in the amended bill of complaint (hereinafter, for brevity, referred to as "the bill") a corporation organized and existing under the laws of the State of Washington, with its principal office

and place of business in the City of Spokane in said State; and alleges that previous to the times mentioned in the bill this defendant had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that this defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

2. This defendant admits that the defendant Northern Pacific Railway Company is and was at all the times mentioned in the bill a corporation organized and existing under the laws of the State of Wisconsin; and on information and belief alleges that previous to the times mentioned in the bill the defendant Northern Pacific Railway Company had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that said defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

3. This defendant has no knowledge or information sufficient to form a belief as to whether, at any of the times mentioned in the bill or at the time of his

death, Belden M. Delaney was a citizen of the United States, or was over the age of twenty-one years, or was qualified to enter or acquire title to one hundred sixty (160) acres of land, more or less, under the homestead laws of the United States; or as to whether said Delaney ever resided upon the land described in the bill.

4. This defendant has no knowledge or information sufficient to form a belief as to whether W. B. Leach, named in the bill, located or settled upon the land described in the bill, viz: the Northeast quarter of Section 20, in Township 43 North, Range 4 East B. M., or upon any part thereof, on or about the first day of April, 1901, or at any other time; or as to whether, if said Leach ever located or settled on said land, he did so with the intention of establishing or maintaining his home thereon, or with the intention of entering the same under the homestead laws of the United States; or as to whether he thereafter continuously or otherwise resided upon said land or cultivated or improved the same.

5. This defendant admits that the approved township plat of survey of the township in which the land described in the bill is situated, was not filed in the United States District Land Office at Coeur d'Alene, Idaho, which is the District in which said land is located, until the fourth day of June, 1909, and that until said date said land was unsurveyed; but alleges that long prior to said date the said land had been surveyed in the field by the official surveyors of the United States under the direction of the

Surveyor General and the Commissioner of the General Land Office; that the lines of survey and the boundaries of said tract of land were properly and plainly marked upon the land by monuments, blazes and other marks; that the said survey so made was thereafter approved by the Surveyor General of the United States and the Commissioner of the General Land Office according to law; and that the lines of survey so traced and marked are identical with the lines of survey shown on the township plat of survey filed as aforesaid.

6. This defendant has no knowledge or information sufficient to form a belief as to whether said Delany acquired or purchased any alleged right or rights of said Leach, possessory or otherwise, in or to said land, or whether said Delaney ever located or settled on said land or established his home thereon, or whether if said Delany ever located or settled on said land, he did so with the intention of thereafter maintaining his home thereon, or with the intention of entering the same under the homestead laws of the United States, or whether he thereafter, continuously or otherwise, resided upon said land or cultivated or improved the same or was residing thereon at the time of his death. And this defendant further specifically denies each and every allegation contained in paragraph 4 of the bill.

7. This defendant admits and alleges that on and prior to the first day of April, 1901, and at all times thereafter until the twenty-third day of July, 1901, the said land was vacant, unoccupied and un-

surveyed public land of the United States, and that no claim, right or title to or interest in the said land or any part thereof had attached or been initiated by any person or corporation whomsoever; but denies that at any time after the twenty-third day of July, 1901, the said land was vacant, unoccupied or appropriated public land of the United States, or free from claim, right or title; and denies that at the time of the alleged location or settlement thereon by said Delany or at any time after the twenty-third day of July, 1901, there was no evidence upon the said land or in the United States Land Office, for the district in which said land was situated, to-wit: in the United States District Land Office at Coeur d'Alene, Idaho, or in the General Land Office at Washington, D. C., to show that said land was claimed by the defendant Railway Company or by this defendant, or that the boundaries of said land had not then been traced, marked or located by monuments, or that there were no marks, blazes, notices or other evidences of the location, selection, claim or possession of said land located or traced upon the ground; and this defendant alleges that, on the contrary, the said land was at all times subsequent to the twenty-third day of July, 1901, segregated from the public domain and appropriated by the selection thereof made by the defendant Railwy Company as hereinafter set forth, and was therefore not open or subject to any other appropriation, entry or claim, or open to settlement by said Delany or any other person, under the homestead laws of the

United States or otherwise; that the fact of such selection, appropriation and segregation was a matter of record and appeared upon the face of the records of the said United States District Land Office at Coeur d'Alene, Idaho, and upon the face of the records of the General Land Office at Washington D. C., the same being the usual, proper and only legal records upon which such selection, appropriation and segregation could appear; that at the time said Delany first went upon said land, and at the time of his alleged location and settlement thereon, and at all times thereafter, said Delaney had full knowledge and notice of the selection of said land by the defendant Railway Company as hereinafter set forth, and of the segregation and appropriation of said land by virtue of such selection; that said Delany went upon said land and made his alleged settlement thereon, and thereafter occupied the same and made application to enter the same under the homestead laws, and endeavored to acquire title thereto, not in good faith, but well knowing of the defendant Railway Company's prior selection thereof, and of this defendant's right thereunder, and in the hope that the claim of these defendants to the land might be defeated upon technical grounds, and that he, said Delany, might acquire said land and the valuable timber thereon for purposes of speculation.

8. This defendant denies that said Delany ever attempted, in good faith, to establish a residence on said land or to make his home thereon, or endeavored in good faith or otherwise, to comply with the

homestead laws of the United States, or to acquire the said land or any part thereof as his home; and alleges that, on the contrary, the said land is and always has been principally, if not wholly, valuable for the timber thereon; that the same is rough and unfertile and of substantially no value for agricultural purposes; and that said Delany went upon the same and endeavored to acquire title thereto, not with the intent of making a home thereon, but with intent to acquire the valuable timber thereon for speculative purposes.

9. This defendant admits that at some time subsequent to the 5th day of July, 1901, the Governor of the State of Idaho, attempted to make an application, under the Act of Congress approved August 18th, 1894, for the survey of the township mentioned in paragraph 6 of the bill and a large number of other townships in the State of Idaho. But this defendant denies that such application, or purported application, was duly made, or made in accordance with the provisions of said act; and denies that such purported application was made to the Commissioner of the General Land Office, as required by the terms of said act; and denies that said purported application was made on or about the 5th day of July, 1901, or was filed in the office of the Commissioner of the General Land Office on or about the 8th day of July, 1901; and denies that the said Governor, or any other person, thereafter, duly or otherwise, caused notice thereof to be published in the manner provided by said act; and denies that upon the filing

of said purported application the lands described therein, or any thereof, became or were withdrawn from the public domain, or reserved from appropriation, or were not subject to entry or appropriation by any person or corporation other than the State of Idaho, to and until sixty (60) days from the date of the filing of the township plat of survey, or for any other period of time whatsoever.

10. This defendant alleges that at some time after the 5th day of July, 1901, the then Governor of the State of Idaho made and signed a writing purporting to be an application, under the said Act of August 18th, 1894, for the survey of the townships referred to in the last preceding paragraph of this answer, which purported application was addressed to the Surveyor General for the State of Idaho and to the Commissioner of the General Land Office and was by said Governor, or at his instance, filed in the office of the Surveyor General at Boise, Idaho; that said Surveyor General thereafter transmitted said purported application to the Commissioner of the General Land Office, by mail, and the same was received in the office of the Commissioner of the General Land Office on or after, and not before, the 15th day of July, 1901; that after the receipt of said purported application the Commissioner of the General Land Office duly considered the same and held and decided that such application was excessive, improvident, illegal, and without effect, and that the same was not entitled to be recognized or allowed, and ordered that the same be rejected; that the said Gov-

ernor was duly notified of such action by the Commissioner of the General Land Office; that no appeal from said order and decision of the said Commissioner, nor any motion or other action for the review, reversal or modification of the same was ever taken by or on behalf of the said Governor, or any other person, or by or on behalf of the State of Idaho; that said order and decision of said Commissioner was never revoked, modified or set aside, but at all times remained in force and effect, that the Commissioner of the General Land Office never gave notice to the Surveyor General, as required by the provisions of said act of August 18th, 1894, of the said purported application; and never, at any time prior to the month of January, 1905, gave notice to the local Land Office of any of the districts in which the townships described in said application were situated, or the local Land Office at Coeur d'Alene, Idaho, of the said application or of the reservation of said townships, or any of them, as required by said act; that said purported application was wholly void and without effect; and that the Commissioner of the General Land Office and the Secretary of the Interior, in the proper exercise of the authority vested in each of them by law, have frequently and in a number of cases held that said purported application was and is illegal, void and without effect, and inoperative to effect a reservation or withdrawal of the townships therein described, or of any land situated in either of said townships, or to create any preference or other right in the State of Idaho, or

to constitute or create an obstacle to the selection or other appropriation of any land in either of said townships by the defendant Railway Company, or any other person or corporation, or to any other claim to any of said lands under the public land laws of the United States, initiated or attaching prior to the filing of the township plat of survey of any such township. This defendant further alleges that the State of Idaho never made any valid selection or application to select the land described in the bill, or any part thereof, either before or after filing of the township plat of survey; and that the State of Idaho does not now claim or assert any right, title or interest in or to the said land or any part thereof.

11. This defendant alleges that on the 23rd day of July, 1901, the land described in the bill was unsurveyed public land of the United States, non-mineral in character, not reserved, and to which no adverse right or claim had attached or been initiated; that the same was situated within the County of Shoshone and the State of Idaho, through which the railroad of the Northern Pacific Railroad Company was constructed and through which the same had been operated by said Railroad Company and by the defendant Railway Company, as its successor, and was then being operated by the defendant Railway Company; that said land was so classified as non-mineral at the time of actual Government survey; that on said 23rd day of July, 1901, the defendant Railway Company by its selection list No. 71, duly made selection of the said land under the provisions

of the Act of Congress entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park", approved March 2, 1899 (30 Stat. L. 993), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of said Act of Congress; that said selection was duly made by filing in the said United States Land Office at Coeur d'Alene, Idaho, a proper selection list or application to select, which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules regulations, and practice established and approved by the Secretary of the Interior and the Commissioner of the General Land Office; that said selection list properly and accurately described said land so selected, in such manner as to designate the same with a reasonable degree of certainty, as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; that said selection list was in all respects regular and proper in form and substance, and that the same was duly accepted, approved and allowed by the Register and Receiver of the said United States Land Office.

12. This defendant alleges that on the 4th day of June, 1909, the official township plat of the survey of the township in which said land is situated, was filed in the said United States Land Office at

Coeur d'Alene, Idaho, and that on said last mentioned date and within the time specified in said Act of Congress, the defendant Railway Company caused to be made and filed in said United States Land Office at Coeur d'Alene, Idaho, in accordance with the provisions of Section 4 of said act, a new selection list embracing the selections embraced in the said selection list of July 23, 1901, including the selection of the land described in the bill, describing the land so selected according to such survey; which said supplemental list was so made and filed in exact compliance and in accordance, in matters of form as well as substance, with the provisions of the said Act of Congress and the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office applicable to such selections.

13. This defendant admits that the said selection list No. 71, described the said land in the manner alleged in said bill, but alleges that said list was so filed in the United States Land Office at Coeur d'Alene, Idaho, and not in the General Land Office.

14. This defendant denies that at the time the defendant Railway Company's said selection list was so filed the description of said land contained in said selection list was imaginary, or that no land in the State of Idaho or elsewhere was or could be so designated or described, whether for the reason stated in the bill or otherwise; and denies that at that time there were no surveyed lands in such proximity to the lands so selected as to render such description and designation definite or certain, or capable of be-

ing made definite or certain, in any reasonable manner, or save and except by the making of an official survey by the proper officers of the United States; and denies that neither the defendant Railway Company nor any of its servants, agents, attorneys or employees knew or pretended to know what lands were referred to by such description, or that the defendant Railway Company did not then know that upon survey, such description would be applied to the land described in said bill; and denies that the description contained in said selection list was insufficient to designate, locate or describe the land so selected, or that the said selection was by reason of insufficiency of description or otherwise, void or of no force or effect; but alleges that, on the contrary, in and by said selection list the said land was properly and sufficiently described, in such manner as to designate the same with a reasonable degree of certainty, in the manner prescribed and required by the said Act of Congress and by the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to selections under said act.

15. This defendant denies that at the time the defendant Railway Company's said selection list was so filed the land described in the bill, or any part thereof, had theretofore been duly or otherwise appropriated by the State of Idaho, or at said or any other time was withdrawn from the public domain (except by virtue of such selection by defendant Railway Company); and denies that the same was not

then open to selection or appropriation by the defendant Railway Company under said Act of March 2nd, 1899, or in any manner, or at all, and denies that by reason of the making and filing of the said or any application or purported application of the State of Idaho for the survey of the said land, as alleged in the bill or otherwise, the said selection thereof by the defendant Railway Company was void or of no force or effect.

16. This defendant admits and alleges that shortly after the township plat of survey was filed in the said United States Land Office at Coeur d'Alene, Idaho, as hereinbefore set forth, but on the 10th day of June, 1909, and not on the 4th day of June, 1909, as alleged in the bill, said Delany tendered to the Register and Receiver of said Land Office an application to enter the said land under the homestead laws of the United States; that such application was rejected by said Register and Receiver; and that thereafter the action of said Register and Receiver in so rejecting said application was confirmed by the Commissioner of the General Land Office and by the Secretary of the Interior; but this defendant has no knowledge or information sufficient to form a belief as to whether or not such application to enter said land was made by said Delany in the form and manner required by law, or in compliance with the rules, regulations and practice of the General Land Office or of the Department of the Interior governing such applications; and alleges that the action of the said Register and Receiver in so rejecting such

application, and of the Commissioner of the General Land Office and the Secretary of the Interior in so confirming such rejection, was right and proper and in accordance with law, and not in violation of any right of said Delany or of the plaintiff; and this defendant further denies that the decision of said officers were based upon an erroneous construction of the law and upon a state of facts concerning which there was and is no conflict or dispute, and alleges, on the contrary, that the decisions of said officers were based upon questions of mixed law and fact.

17. This defendant alleges that neither in the proceedings in the said Coeur d'Alene Land Office, nor in the General Land Office, nor before the Secretary of the Interior upon the said application of said Delany to enter said land, nor otherwise in connection with the same, was it ever at any time or in any manner claimed or asserted by or on behalf of said Delany, or by any other person, that the alleged claim or rights of said Delany rested upon anything which had occurred prior to his alleged settlement on said land on June 21, 1903, or upon the alleged settlement and location thereon by said Leach, or that any claim or right of any kind whatsoever had attached or been initiated to said land prior to the selection thereof by the defendant Railway Company on July 23, 1901, or that at the time of the selection of said land by the defendant Railway Company on July 23, 1901, the same was not then vacant and un-

appropriated public land of the United States subject to such selection.

18. This defendant alleges that the said selection so made by the defendant Railway Company of the land described in the bill, and the said selection list so filed by it were thereafter duly approved and allowed by the Commissioner of the General Land Office and by the Secretary of the Interior, pursuant to and as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; and that thereafter, and at or about the time stated in the bill, a patent of the United States conveying the said land to the defendant Railway Company was duly issued, granted and delivered to the defendant Railway Company in accordance with law.

19. This defendant alleges that shortly after the selection of said land by the defendant Railway Company on July 23, 1901, and long prior to the time when said Delany went upon said land as alleged in said bill, this defendant entered into an agreement with the defendant Railway Company whereby the defendant Railway Company for a valuable consideration paid to it by this defendant, sold the said land to this defendant and undertook and agreed to convey the same to it by warranty deed; that thereafter and on or about the 5th day of October, 1903, this defendant and the defendant Railway Company entered into a subsequent written contract dated October 5, 1903, whereby the defendant Railway

Company, for the said valuable consideration so paid to it by this defendant, and in consideration of the said prior agreement for the sale of said land to this defendant, agreed and undertook to convey the same to this defendant as aforesaid; that on the 17th day of July, 1916, the defendant Railway Company, by warranty deed bearing said last named date, duly conveyed the said land to this defendant; and that this defendant now claims to be and is the owner of said land, and all thereof, in fee simple.

20. This defendant denies that neither the defendant Railway Company nor this defendant, nor any agent, servant, attorney or employee of either of said defendants, have ever been in possession of said land or any part thereof; and denies that the plaintiff or said Delany or his alleged predecessor in interest have been in possession of said land since the first day of April, 1901, to the exclusion of all other persons or corporations, or at all; and denies that the defendants have not complied with the laws of the United States so as to entitled them to claim said land as against said Delany or the plaintiff; but alleges that, on the contrary, the defendant Railway Company has, in all respects, complied with all the laws of the United States and with the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office; and that by virtue of matters hereinbefore set forth, the defendant Railway Company became and was entitled to the said land and entitled to receive patent therefor.

21. This defendant denies that any of the acts or proceedings of the defendant Railway Company concerning the said selection, or any of the acts or proceedings of the officers of the said Coeur d'Alene Land Office, or of the Commissioner of the General Land Office, or of the Secretary of the Interior in connection therewith, or in the issuance of patent to the defendant Railway Company as aforesaid are or were contrary to or without authority of law, or in violation of any rights of said Delany or of the plaintiff; and denies that the rejection of said Delany's said application was wrongful or unlawful, or in violation of any right of said Delany or of the plaintiff, or based upon an erroneous construction of the law, or upon a statement of facts concerning which there was and is no conflict; and alleges that all the acts and proceedings of the defendant Railway Company and of the officers of said Coeur d'Alene Land Office and of the Commissioner of the General Land Office and of the Secretary of the Interior in rejecting and confirming the rejection of said Delany's said application and in approving the selection of said land by the defendant Railway Company and in issuing patent to it, were right and proper and in accordance with law.

22. This defendant denies that on the 16th day of June, 1916, or at the time of issuance of patent to the defendant Railway Company as aforesaid, or at any other time whatsoever, said Delany or the plaintiff was the owner of said land or the holder of the legal title thereto or entitled to patent for the same;

and denies that said Delany or his heirs or other successors in interest or the plaintiff has or have now, or ever had, any right, title, or interest whatsoever in or to the said land or any part thereof; and alleges that by virtue of its selection of the said land as hereinbefore set forth, and by virtue of the patent issued to it as aforesaid, the defendant Railway Company became and was the owner of said land in fee simple, free from any claim, right, title or interest of said Delany or of the plaintiff or any other person whomsoever, except this defendant; and that by virtue of the conveyance of said land by the defendant Railway Company to this defendant became and it now is the owner of said land and all thereof in fee simple, free from any claim, right, title or interest to or in the same on the part of said Delany or the plaintiff or any other person whomsoever.

23. Defendant admits that said Belden M. De-
cident to form a belief as to whether said Delany died
subsequent to the commencement of this suit; but this
defendant has no knowledge or information suffi-
cient to form a belief as to whether said Delany died
testate or intestate, or as to whether he left any heirs
at law; or as to who the heirs of said Delany, if any,
were or are; or as to whether the plaintiff, Alra G.
Farrell, was or is an heir of said Delany; or as to
whether any heir of said Delany has assigned, con-
veyed, or otherwise transferred to said plaintiff his
supposed right, title or interest in the land de-
scribed in the bill, or any thereof; or as to whether
said plaintiff has in any manner acquired or suc-

ceeded to the supposed rights or interests in said land, or any thereof, asserted or claimed by said Delany.

WHEREFORE, this defendant prays that it be hence dismissed, with costs.

EDWARD RUTLEDGE TIMBER
(Corporate Seal) COMPANY.

By WM. J. MERRIGAN,
Secretary.

STILES W. BURR,
St. Paul, Minnesota.

SKUSE & MORRILL,
Spokane, Washington.

Solicitors and of Counsel for
defendant, Edward Rutledge
Timber Company.

(Duly verified.)

Endorsed. Filed Nov. 5th, 1917,
W. D. McReynolds, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)
No. 660.

ABSTRACT OF EVIDENCE.

The following is an abstract of so much of the evidence introduced on the trial of the above entitled case as is material to the questions raised on this appeal.

At the commencement of the trial, after calling the witness W. B. Leach but before the latter had testified, counsel for plaintiff, Mr. Kenyon, stated to the Court, in substance, that while it was alleged in the

complaint that the witness W. B. Leach settled on the land in suit on or about the first of April, 1901; and while this allegation had been made in good faith on the strength of information believed to be correct; it had been ascertained by conference with the witness Leach and others, immediately previous to the trial, that Leach did not in fact make settlement on the land until the year 1902; so that the issue of priority based upon the allegation of settlement in April, 1901, was eliminated from the case.

W. B. LEACH, called as a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

I settled upon the Northeast Quarter of Section 20, Township 43, North Range 4, E. B. M. in the spring of 1902. I built a cabin and of course cut a little wood around there, opened up a little, and done what little improvement I could, and I put up notices on the corners of this land which was then unsurveyed. We measured this land out. Ed Kleinard, the man who located me, helped me put up the notices. The notices stated that I had taken up 160 acres of land as a homestead. Put a notice on each corner and plazed the line around the land. I also kept my name written on the door. No one else ever laid any claim to this ground while I was there. I made my home there from about May 22nd, until about June 23, 1903, the following year, when I let Delany have it. I sold and turned over to Delany all my improvements, cooking utensils, bed and table, and

what I had there. He took possession and established his home there at that time.

I was born in the United States, and was competent at that time to acquire title to land under the homestead laws.

ED KLEINARD, called as witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

I reside at Clarkia, Idaho, where I have lived close to twenty years. I know W. B. Leach the witness who just testified. In May, 1902, I located him upon what is now the Northeast Quarter of Section 20, Township 43, North Range 4 E. I blazed out the claim, and when I took him on it I put up notices, took an ax and blazed the line around it from one corner to the other, and posted a notice on each corner, stating that Leach claimed a half mile square within the blazed line as a homestead. I was a witness to his notices.

I was back there again in July, 1904. I saw very good improvements on the land. He had done some clearing. I think he built a new cabin, because it was not the same cabin that Leach built. It was built of logs. It was large enough to stand the test as far as being big enough to comply with the homestead laws. I should judge it was 14x16, or 12x16, or something like that. About seven or eight feet high. Had doors and windows. It was furnished at this time with cooking utensils, beds and bedding. I stopped there over night. There was a little garden

in the clearing. About two acres was cleared in all; not all this was in cultivation at that time. It looked as though it had been cleared too late to put in a crop, about one-half acre was in crop. The garden appeared to be cultivated and cared for.

I was on the claim again a couple of times in 1910. First time about the latter part of Septemer. I found a little better improvements than before, some fencing and more clearing and more garden. There was a couple of acres cleared any way, and it seemed to be all fenced. He had two good buildings there, what he called a barn and the cabin. He had constructed a new and better cabin and used the old one for a barn. The cabin had a floor of split cedar hewed with an adz, and a shake roof. It was well furnished and well stocked with supplies.

Delany and his brother were there and had been fighting fire there at the time, there was fire all around there at that time. I was engaged in fighting fire a month, and they were at it some time before I went in. Most of the time while they were fighting fire they lived in Delany's cabin, there at his home.

I was there again in 1912. The improvements were much the same as I saw in 1910, only a little more clearing. All of the ground was planted except what was in hay. He had an acre and a half or two acres in hay, and about one-half acre in garden, about two acres all together. There was no one on the place when I was there in 1912.

CROSS EXAMINATION

This is agricultural land. It would grow crops if it was cleared. It is pretty rough, and has some ra-

vines running through it, and is covered with heavy timber. There are flat benches on it but most of it is rough land. I heard Leach say his cabin burned, and Billy Delany, as he called himself, went in as soon as it was burned and built another one. I remember of his building it. There was about two acres cleared in 1912; that much any way and there might have been four', I don't know. There was pretty close to two acres in 1904, but it was not thoroughly cleared yet. I did not see any one there when I was there in 1904. He had the brush cut and he went in and done some logging right after that, took teams in there and logged. I saw them with the teams in there in 1910. He had his brother's team in there.

RE-DIRECT EXAMINATION

If there was no timber on this land you could cultivate about eighty acres of it.

ALRA G. FARRELL, called as a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

I am the plaintiff in this case. I am the sister of Beldon M. Delany, the party who started this action. He died on November 21st, 1916. He had never married, and left no father or mother. He was survived by three sisters and a brother, to-wit: David Delany, Alice Delany McDonald and Lena Delany Lohoefer and myself.

Q. Those are all the brothers and sisters?

A. Yes.

He left no child of any deceased brother or sister.

Alice Delany McDonald is married, her husband's name is Lee McDonald. Lena Delany Lohoefer is married, and her husband's name is G. A. Lohoefer. David Delany is a bachelor.

Plaintiff's Exhibit No. 1, being a quit claim deed from Alice Delany McDonald, Lee McDonald, David Delany, Lena Lohoefer and G. A. Lohoefer to Aira G. Farrell, conveying all of their right, title and interest in and to the Northeast Quarter of Section 20, Township 43, North Range 4, E. the land involved in this action, identified and introduced in evidence.

Mr. Burr: "I don't raise any question of the sufficiency of the deed as a conveyance from those people of what rights they were able to convey, but I don't mean by that I think they were competent to convey, or that they had any title to convey."

I know that my brother Beldon M. Delany was making his home upon this land at the time of his death. Beldon M. Delany was a native born citizen of the United States, about 23 years of age. He had never made a homestead entry prior to his settlement upon this land, and was not at that time the owner of any land.

IRA MCPEAK, called as a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

I live at Clarkia, Idaho, where I have lived since the fall of 1892. I knew Beldon M. Delany prior to 1900, before we went into the Marble Creek country. I met him on his place on Marble Creek in

July, 1903, what is now the Northeast Quarter of Section 20, Township 43, North Range 4, E. I had a homestead at that time partly on Section 19 and partly on Section 20. Our cabins were a little over a half mile apart. I settled there in 1901. Visited him a couple of times in July 1903. He built a cabin. Leach's cabin I think burned in 1902. Delany built a log cabin with a shake roof, about 14x16 feet in size, had doors and windows. Delany lived in it. He had stocked it with provisions and cooking utensils. He put in a floor. There was a little clearing around the cabin at that time and planted to a little garden stuff. I saw Delany there in February, 1904. He was living there at that time. He was living there in July, 1904. I was at his place then. He had a little more cleared. He had a garden of potatoes, radishes, lettuce and such things. The garden seemed to be well cared for. I saw him there three or four times during the summer at different times. I didn't go in in 1905 until late, about July or August. Delany had his garden in at that time. He had something like an acre cleared. Practically all that was cleared was in crop. Some timothy and some small garden truck. I was there a number of times that summer and know that the garden and crop was cultivated and cared for. Delany was making his home there then.

I saw him there again in 1906. We generally went in as early as the snow would be off so we could get in. He was there when I went in in 1906. He cleared some more land. Planted and cultivated what he

had already cleared, planted some more timothy and grain, I believe he had some oats in and some garden stuff and potatoes. Probably a quarter of an acre in garden stuff and potatoes. I saw him there as late as September, possibly October.

I also saw him there in the summer of 1907, I couldn't say exactly what date. His clearing and improvements were in good shape that year, he had some in garden and had cleared a little bit land. I next saw the place before Delany died, in August, 1911. Delany was not there when I was there in 1911. At that time he had between two and three acres cleared. He had some timothy and some grain too. I lived on my claim until July, 1910. Up until that time Delany made his home on this piece of land. He was working there most of the summer of 1910. He done quite a little clearing, and built a new cabin. At that time he had this house, and what he called a tool house, and a barn, and something like two or three acres cleared. He had a log and brush fence around his clearing. The cabin had a puncheon floor. His brother was living there with him. They were both working on the claim. The cabin at that time was furnished with cook stove, some chairs, and cooking utensils of all kinds that a person would need, and dishes, and there was also a supply of provisions. His improvements were as good, if not better, as most of the settlers in the vicinity. Probably one-half of the land would be suitable for crops if the timber was cleared off.

CROSS EXAMINATION

If the land was cleared I think you could plow and crop one-half of it, something like that. The land is covered with heavy timber. It is comparatively level about the clearing. It is a rough and broken quarter. I lived on my homestead there from 1901 most of the time until 1911. I was burned out in 1910, the year of the big fire, but went back in 1911. Have not been there since.

The Court: Are your other witnesses along somewhat the same lines, Mr. Kenyon?

Mr. Kenyon: Along the same lines, your honor.

The Court: Are you going to controvert the facts generally shown by these witnesses, Mr. Burr?

Mr. Burr: I don't think we are going to controvert, your honor, but I would prefer to have the showing made by the witnesses; but we have no evidence to oppose the evidence that is being given here on the question of subsequent cultivation.

The Court: Then I see no use of putting the other witnesses on. In other words, if you are not going to put any testimony in relative to these general matters as to cultivation and improvement.

Mr. Burr: We are not going to dispute it at all.

The Court: I can't see that other witnesses then would help you any, because I shall assume that these witnesses are telling the truth, if it is not controverted. If there is any respect in which they can supplement it, very well.

Mr. Burr: I think there is a marked insufficiency of proof, your Honor.

The Court: That may be. I understand your position. You are going to contend that as a matter of law this proof is insufficient, assuming it to be true.

Mr. Burr: Assuming it to be true. But I am not going to contend that it is not true.

ORAL AVERY, called as a witness on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION

I live at Clarkia, Idaho, where I have resided for 15 years. I knew Beldon M. Delany in his life time, and had a homestead near his. I settled there in 1904. I first met Delany on his claim in the summer of 1904. He was there working, he had a cabin and some clearing. I didn't see him any more until the next summer. He had been there and done some more improvements. In 1905 I helped him saw lumber for a cabin floor and helped him fix up the cabin. In 1906 I also went in there in the summer and saw him on his claim and working and improving the land, and I was there in the fall of 1907. He was not there but I could tell from the way his land looked he had been there. My sister had a claim at Clearwater. I used to go through there by his claim to see her two or three times a year, going back and forth, and he always kept up his improvements, also had in a garden, and the cabin was also in good fix. In 1910 was in several times and got supplies, meat and flour, from there to fight fire, and Delany was fighting fire in 1910 for about thirty

days. In the summer of 1912 I went to stay at his place. In 1912 there was a house, a barn, tool house, and cellar or root house, and about three acres, or maybe three and a half acres cleared, all in cultivation.

IRA MCPEAK, a witness on behalf of the plaintiff being re-called, testified as follows:

DIRECT EXAMINATION

On June 21, 1903, the nearest surveyed line to the Northeast Quarter of Section 20, Township 43, North Range 4, E. B. M., was the east line of Township 43, North Range 2, E., B. M. $7\frac{1}{2}$ miles distant. The land between these two lines was very rough and mountainous, most of it covered with heavy timber.

The foregoing testimony of the witness McPeak was seasonably objected to by counsel for defendants, on the ground that the same was incompetent, immaterial and not the best evidence, and the same was received by the Court subject to the objection.

CROSS EXAMINATION

The South line of Township 34, North Range 4, E. B. M. was surveyed at that time. I think that line was a little farther away from Delany's homestead.

Plaintiff's Exhibit 2, Deposition of Clay Tallman, Commissioner of the General Land Office, introduced in evidence, the material portion of which is as follows:

The Commissioner of the General Land Office of

the United States is the custodian of all the records and files of the Land Department.

Taking advantage of the information acquired through the instrumentality of the officers, clerks and employes of the General Land Office, whose business it is to attend to the details of the work of that bureau, I will say that the records of the General Land Office show that claims were initiated to the Northeast quarter of Section 20, Township 43, North Range 4, E. B. M. State of Idaho, prior to the survey of said tract. The records of the office show that the survey of said township was approved November 24, 1908, and filed in the local United States Land Office at Coeur d'Alene, Idaho, on June 4, 1909. The records further show that on June 10, 1909, one B. M. Delany filed homestead application on the Northeast Quarter of said section, in which application he alleged settlement of this land on June 21, 1903.

The records of the office show that as early as July, 1901, the Governor of the State of Idaho filed an application in the office of the United States Surveyor General for the survey of this Township 43, North Range 4, E. and other townships, such application being made under the Act of August 18, 1894, for the purpose of satisfying grants made by Congress to the State of Idaho.

The records of this office further show that as early as July 23, 1901, the Northern Pacific Railway Company selected said Northeast Quarter, with other lands, under its list No. 71, under the Act of March 2, 1899 (30 Stat. 993), and, further, that on

June 4, 1909, the Railway Company filed a re-aranged list describing the tracts according to the Government survey. So far as I have been able to inform myself, these are all of the claims initiated or attempted to be initiated, to the lands in question prior to the filing of the approved plat of survey on the date I have stated.

I have caused an examination of the records and files of my office to be made for the purpose of determining whether these applications to which I have just testified are the only ones shown of record, and for the purpose of ascertaining whether or not there were any other claims initiated or attempted to be initiated, prior to the filing of plat of survey, and to the best of my knowledge and information, the claims I have described were all the claims initiated or attempted to be initiated, to the lands in question, as shown by the records of this office, prior to the filing of the plat of survey.

The papers marked Exhibit "A" consist of a bunch of certified copies of records of the General Land Office, under one certificate, being described in the certificate as "copy of application for survey by the Governor of Idaho under the Act of August 18, 1894, and a copy of School Indemnity List Coeur d'Alene 02604, with copies of papers and letters relating to said application and list, and a copy of General Land Office decision dated July 16, 1914, relating to State Indemnity Selection List Coeur d'Alene 02604 and 02484, and other lists." As to what these papers are, they show for themselves. As to the

date of filing of the respective papers, I can only testify as to the dates shown on the papers themselves, which is the best and only information available. The application for survey to which I just referred is the first paper at the top of this bunch of certified copies, which for identification I have marked "A-1" in the upper right-hand corner. So far as I know, these were all the papers that were considered in connection with the decision of the conflicting claims to this township. It should be stated, however, that the application for survey embraces several townships, the status of many of which is doubtless the same. I am unable to state what if any other papers in connection with the disposition of claims to the land in other townships embraced in said application for survey might have been considered by the adjudicating officers in deciding the conflicting claims referred to, to the NE $\frac{1}{4}$ Section 20, Township 43, N., Range 4 E.

"Q. Please state whether in the usual orderly course of business any other papers would be properly considered.

"A. It seems to me that any papers, decisions or data before the office or Department, relating to other townships in the same application for survey similarly situated might have been properly considered in connection with these conflicting claims to this land here at issue for whatever they were worth.

"O. Do you know of any such, and if so please state.

"A. I do not know."

The certified copies handed me and marked Exhibit "B" for identification, consist of copies of Clear List No. 109, Northern Pacific Railway Company, and papers and letters relating thereto. The papers handed me and designated as Exhibit "C" consist of copies of selection list No. 71 of the Northern Pacific Railway Company, and papers and letters relating thereto, and designated on the Land Office records as Coeur d'Alene 02484. To the best of my knowledge and belief they are all of the records and files pertaining to the list named, except copy of the final patent, copy of the notes of survey of the township, plat of survey and tract book records. There may be also confidential reports of special agents bearing on some or all of the lands referred to in this list, which are not considered a part of the public records, but so far as I can find, there are no records or files respecting these lands which need to be considered as confidential, for the reason that it appears that under date of May 13, 1915, the Acting Director of the Geological Survey certified with respect to this section 20, and other lands, that the records of the Survey indicate that there are no valuable deposits of coal or other minerals within the area specified, and that the lands have no valuable power site or reservoir possibilities. A copy of this certificate is included in the certified copies referred to under Exhibits "B" or "C". I have caused an examination to be made, and to the best of my knowledge and belief this is the only paper of that charac-

ter with respect to this particular section of land bearing on this railroad selection.

Exhibit "D" is copies of the records and files of the General Land Office pertaining to homestead entry of Beldon M. Delany, the same being designated on the records as Coeur d'Alene 02539. To the best of my knowledge and belief, they are all of the papers on file in this office relating to the homestead proceedings in question. I do not mean to say that these are all the records and files in this office in any way relating to the land in question, for as appears by my testimony there were other claims filed for the land, also there are on file the notes of survey of the land and the plat of such survey.

Q. In the regular orderly course of business, do you know of any other files or papers that would have been proper to consider in connection with this homestead claim?

A. In all cases of entries and selections for public lands, the tract book records of the General Land Office and of the local office, and the plats filed in the local office on which entries and selections as a rule are marked, are proper and necessary subjects of reference in determining rights to public lands.

Q. Please state upon what records and files in case where there had been no hearing an application for homestead entry would be considered.

A. It would be considered on the basis, first, of the papers constituting the application under consideration, secondly, all conflicting applications to enter or select, or entries or selections, if any, for the

same land as disclosed by the tract book records, local office plate, or indexes, together with all the records and files constituting or making up any such conflicting claims that might be found, inclusive of withdrawals by the Government, as shown by such records.

Q. Would our would not that have anything to do with the question whether he complied with the homestead law under which his application was made?

A. Not necessarily, but they might. Of course the validity of the homestead entry must stand on its own facts and the acts and performances of the entryman in compliance with the law. The other records and files might be of such a character, however, as to show that he had not complied with the law, and place the Government on inquiry before proceeding to allow patent.

Q. If you know of any other records, files or papers that were considered in connection with the question whether the homestead applicant complied with the law, please state what it is.

A. I know of no other records or files bearing on the compliance of the homestead entryman with the law. It is understood of course that this answer refers to the affirmative acts of the homestead entryman in compliance with the requirements of the homestead law and is not intended to have any bearing on the questions of conflicts that maye have arisen by reason of other and different claims to the same land.

The papers handed me marked Exhibit "E" consist of a copy of the field notes of the survey of the subdivisional lines of Township 43, North Range 4, E. Boise Meridian, Idaho, so far as they pertain to section 20 of said township and range, and they are complete so far as concerns the subdivisional lines of said section 20. After a careful search of the records which I have caused to be made in this office, to the best of my knowledge and belief these are all the records and files of the General Land Office relating to the three claims which I have mentioned, with the exceptions heretofore noted, and they are all of the papers, files and records that would have been considered in the usual and ordinary method of transacting business in the Land Department.

CROSS EXAMINATION, BY MR. BURR:

I intended to state, for instance in the homestead case, that these certified copies include all the papers filed and all the papers or records in our office in connection with that case. I do not mean to say that in making decisions the records and files in the other related cases were not also considered. So far as I know, however, I don't know of any papers outside of these files that could have been considered in the disposition of any one of these cases. The rule is to keep all the papers in a case that is appealed from the General Land Office in one record. When the Department is through with that record, the entire record is returned to our office for the files. Referring to Exhibit A-1, in the light of this paper it-

self and of related papers and correspondence, I should say that the filing mark "Received July 8," indicated the date of the receipt of this paper in the office of the Surveyor General at Boise, Idaho.

I do not mean to say that this set of copies Exhibit "A" contains all of the records of the department and the proceedings of the department or of the General Land Office relating to that application for survey. I think I mentioned in a previous answer to a question on direct examination that the application for survey in question covers a number of townships. I do not know at present, nor do I mean to testify, that the various sets of certified copies referred to include all of proceedings with respect to all the tracts of land referred to in that application. There may have been many proceedings on other lands in no way connected with this township or section. It is not at all unlikely or improbable that in passing upon the question of the validity of this application for survey with respect to land in Township 43 N., Range 4 E., the department and the General Land Office might well have considered, and possibly did consider, the records and proceedings relating to that application which would be found in files relating to different townships. In fact, I understand that these townships are involved in the so-called Marble Creek cases, with respect to which there has been a good deal of departmental litigation during past years. I do not wish to be understood to testify that the certified copies heretofore referred to in my testimony cover all papers considered in connection with the

conflicting claims in this township. If I did so testify, it was inadvertent. I cannot testify as to what papers some adjudicating officer, either in my office or in the Department of the Interior, may have considered in the decision of any particular case, but I do intend to testify to the fact that to the best of my knowledge and belief such copies include all of the official records in the cases in question which such adjudicating officers could have had before them at the time of making the decision in question, insofar as such papers consist of the records and files of papers filed with specific reference to these particular cases.

Q. You have testified that in the usual and ordinary course of business in the adjudication of cases of this character, other papers on file in other so-called cases might properly be considered. Now do you wish to be understood to testify as to whether or not the adjudicating officer passing upon the conflicting claims to this land did or did not consider papers in other cases, and that it is not improbable that it might have been done?

A. It is possible. In the handling of this or any other cases the guide of the officers under ordinary circumstances is the tract books which are intended to show all conflicting claims to the particular tracts of land involved. They would very naturally examine the records in those other cases unless they were old cases, which had been entirely closed and therefore need not be considered. Such records might refer to still other cases similar or identical in char-

acter, the consideration and disposition of which might have some bearing on the case to be adjudicated.

Q. Then from your answer and from what I know of departmental practice, I take it that the papers considered in dealing with the validity of a homestead claim with regard to conflict with other claims to the same land would very likely be found in the file of that particular case, but that in dealing with the question of the right of the Railway Company selecting a number of tracts of land, or such a question as that, or an application for survey involving a number of townships, it would be much more probable that rulings and orders and proceedings and testimony taken in cases involving other tracts of land but the same selection list or the same application for survey, would be considered?

A. Certainly.

Q. The file relating to a particular contest between an individual settler, claimant and railway company, or the State of Idaho, or relating to a particular homestead claim would not be likely to contain papers bearing upon the validity of the railway selection or the State selection.

A. Not necessarily, and not likely insofar as such validity or invalidity was in no way concerned with the homestead.

In the ordinary course of our practice and procedure a complete showing might not be in the file relating to the individual claim. The validity of one claim might depend upon the facts in the conflicting

claim, and insofar as the facts pertaining to one claim affect the other, somewhere in both records evidence of that fact should appear.

RE-DIRECT EXAMINATION

I did not state that there were other records pertaining to other conflicting claims as against that of Delany, for I knew of none such. I did state with respect to the application for survey, a copy of which appears in Exhibit "A", that such application included a large area of lands other than this section 20 under consideration, and that there may have been various other examinations made and decisions rendered with respect to such other claims which might disclose matters properly to be considered, and which might have been considered fully, in connection with conclusions arrived at on this matter of application for survey. It is my belief, from the examination we have made of the record, that there is nothing else of record other than what is contained in these various sets of certified copies by which the conflicting claims of these conflicting claimants could be determined, but I cannot presume to state that no other cases or records were taken into consideration in the determination of the rights of these parties. Reference has already been made to the Thorpe case, the Daniels case, and other cases decided by the Secretary of the Interior on appeal from the General Land Office, all of which I understand involved closely related questions. Where cases are reported in the published reports of the Secretary

of the Interior, the volume of the land decisions in which it is published is as a rule pointed out in the citation, but there are many decisions of the Secretary of the Interior that do not appear in the published decisions. They are all public record available to the public, but the land decisions that are published are selected decisions and constitute only the important and particularly leading cases.

Mr. Burr: Following your Honor's suggestion, we consent to the introduction of the deposition of Commissioner Tallman, with the understanding that it does not apply to the exhibits referred to in that deposition and attached to it, which I think should be offered separately.

Plaintiff's Exhibits 2-A, 2-B, 2-C, 2-D, and 2-E admitted in evidence.

Plaintiff rests.

Defendants' Exhibits No. 1, 2 and 3 admitted in evidence.

It is conceded on the part of plaintiff that the records of the United States Land Office in Coeur d'Alene, do not show any withdrawal of the land on the State's application for survey, until the one made by the letter of January 20, 1905.

Defendant rests.

ABSTRACT OF EXHIBITS.

Plaintiff's Exhibit "2-A" is in part as follows:

Boise, Idaho, July, 5th, 1901.

The U. S. Surveyor-General for Idaho, and the

Honorable Commissioner of the General Land Office.

Sirs:—

The undersigned Governor of the State of Idaho, hereby applies under the provisions of the Act of Congress approved August 18th, 1894, for the survey of the following townships, with a view to satisfy the public land grants made to the State of Idaho by the Act of Congress approved July 3rd, 1890, admitting said State into the Union, and subsequent Acts amending the same:

Township 43 N., R. 4 E. * * * *

(And other lands, describing eighteen townships in all.)

Very respectfully,

F. W. HUNT,
Governor.

DEPARTMENT OF THE INTERIOR.

Office U. S. Surveyor General,
District of Idaho.

Boise City, July 10, 1901.

Honorable Commissioner of the
General Land Office,
Washington, D. C.

Sir:—

I have the honor to submit herewith an application of the Governor of the State of Idaho for the survey of the following townships:

Township 43 N., R. 4 E. * * * * (And

other land, describing eighteen in all).

* * * * *

Based upon the Governor's application, I recommend the survey of the townships stated, with the exception of the three included or to be included in awarded contracts, but it is not deemed advisable to proceed with advertising for bids until after the demands of settlers can be more accurately determined.

Very respectfully,

JOSEPH PERRAULT,

U. S. Surveyor General for Idaho.

(Endorsed as follows) U. S. General Land Office.

Received July 15, 1901.

United States Surveyor General

Boise City, Idaho.

Dated July 10th, 1901.

Subject.

Submits Division E application for the Governor of Idaho for certain surveys.

See to Surveyor General July 10, 1901. Feb. 12, 1902.

See to F. W. Hunt Governor Boise, Idaho, and Hon.

H. Heitfeldt, U. S. Senate, February 10, 1902.

File July 15, 1901.

See to F. W. Hunt, Governor, Idaho, Oct. 6, 1902.

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE.

Washington, D. C., July 19, 1901.

Subject:

Application of the Governor for public surveys,
Idaho.

The U. S. Surveyor General,
Boise City, Idaho.

Sir:

I am in receipt of your letter of July 10, 1901, enclosing the application of the Governor of Idaho, dated July 5, 1901, for the survey of 17 full townships and one fractional township, designated as follows:

Tps. 43, N. R. 4 E. (And other townships).

* * * * *

In reply you are requested to secure from the Governor, or the proper officer, a statement showing the *total area* of lands selected to date; also the approximate area of *all* of the townships heretofore applied for by the Governor; also to report whether or not the *total area* to which the State is entitled under the enabling act has not, or may be selected from the lands embraced in the townships heretofore applied for, the total number of which (approximately) is 206.

Pending the receipt of the report of the Governor no action will be taken in the matter of withdrawing from further disposal the lands in the 18 designated townships named in the Governor's application of July 5, 1901.

In the opinion of this office the areas embraced in the townships designated in the applications for survey heretofore made by the Governor from April, 1895 to July 1, 1901, are deemed sufficient to enable the State officers to make the requisite selections *in full*, and that the public interests will *not* be sub-

served by further withdrawals of lands from settlement, pending the settlement of the State's rights under the Act of Congress approved July 3, 1890, admitting Idaho into the Union, and subsequent acts.

Very respectfully,

BINGER HERMANN,
Commissioner.

Department of the Interior.

General Land Office.

Washington, D. C., February 12, 1902.

Subject:

Application by the Governor for public surveys.
Idaho.

The U. S. Surveyor General,
Boise, Idaho.

Sir:

Referring to your letters of July 10, August 17, and August 20, 1901, transmitting the applications of the Governor of Idaho for the survey of designated townships under the provisions of the Act of Congress approved August 18, 1894 (28 Stats. 384) you are advised that by office letter "E" of February 10, 1902, Hon. F. W. Hunt, Governor, has been advised that this office has recommended to the Secretary of the Interior, and there has been inserted in the estimates for the public surveys and resurveys of the public lands for the fiscal year ending June 30, 1903, an additional amount of \$25,000; also that in the event of said additional amount being finally appropriated by this office will take pleasure in consider-

ing the Governor's pending applications for additional surveys under the act of August 18, 1894, supra.

Very respectfully,

BINGER HERMANN,

Commissioner.

DEPARTMENT OF THE INTERIOR

General Land Office.

23464-1902. Washington, D. C., February 10, 1902.

Subject:

Application by the Governor for public surveys in Idaho.

Hon. F. W. Hunt, Governor,

Executive Office,

Boise, Idaho.

Sir:

I am in receipt, through Hon H. Heitfeldt, U. S. Senate, of your letter of January 25, 1902, relative to you rapplication under date of July 5, 1901, for the survey of designated townships in Idaho, under the provisions of the Act of Congress approved August 18, 1894 (28 Stats. 394); also calling attention to your letter of August 16, 1901, submitting report as to the status of the lands previously applied for by the State, as requested per office letter "E" of July 19, 1901.

In reply I have the honor to inform you that your letter of August 16, 1901, as also subsequent applications for survey, were duly received, and the delay in acting thereon was due to inability to definitely de-

termine the status of the apportionment made to Idaho of the annual appropriation for surveys and resurveys of the public lands for the ensuing fiscal year.

To the end of enabling this office to increase the apportionment to Idaho of the annual appropriation for public surveys for the fiscal year 1902-1903, so as to provide for the cost of survey under said act of August 18, 1894 supra, I have recommended to the Department, and there has been inserted in the estimates for the surveys and resurveys of public lands for the fiscal year 1902-1903 an additional amount of \$25,000.

In the event of said additional amount being appropriated I will take pleasure in considering your application now pending for additional surveys.

Very respectfully,

BINGER HERMANN,

Commissioner.

NOTICE.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE.

Notice is hereby given that the State of Idaho on the 30th day of July, 1909, filed in this office a list of lands No. 02601 selected by its State Board of Land Commissioners for Indemnity School purposes under Section No. 4, Act of July 3d, 1890, as follows:

Part of Section	Section	Township	Range
All	20	43	4 E.

Copies thereof by descriptive sub-divisions have

been posted in this office for inspection by any person interested, and the public generally.

Section 11, Regulations April 25, 1907.

"During the period of publication, or any time thereafter, and before final approval and certification the local officers may receive protest or contest as to any of the tracts applied for, and transmit the same to the General Land Office."

Where lands sought to be selected are alleged by way of protest to be mineral or where applications for patent therefor are presented under the mining laws, or are otherwise adversely claimed, proceedings in such cases will be in the nature of a contest, and will be governed by the rules of practice in force in contest cases."

Published in

W. H. BATTING,

Idaho Press,

Register.

Wallace, Idaho.

DEPARTMENT OF THE INTERIOR

General Land Office.

Washington, July 16, 1914.

State of Idaho,

Heirs of Charles E.
Everson, and Martin
Groundwater, Guar. of
John C. Groundwater,

v.

Northern Pacific Ry.
Co.

Register and Receiver,
Coeur d'Alene, Idaho.

Holding State indemnity school land selections for cancellation and suspending action as to conflict between railway and homestead claims.

Sirs:

On July 23, 1901, there was filed in your office Northern Pacific Railway Company's list No. 71, under the act of March 2, 1899 (30 Stat., 993), covering * * * (here follows description of a quantity of lands in Township 43 N., Range 4 E. B. M., including all of Section 20) then unsurveyed. The plat of the survey of said township was filed in your office, June 4, 1909, and on the same date, the company filed its re-arranged list No. 71, redescribing its selections to conform to the survey, as required by said act of March 2, 1899, the tracts being then described as * * * (here follows re-descriptive descriptions, including "Section 20"). This list was held by you until August 31, 1909, when you rejected it for the reason that the same was in conflict with selections made by the State of Idaho. Notice of said rejection was not given to the company until September 20, 1909, and, on October 5, 1909, the company appealed from said rejection, urging that you were without authority to take any action thereon other than to report the same to this office for the reason that said list was merely filed to redescribe the original selections according to the survey.

Complaint having been made by the resident attorneys for the company that you had allowed selections by the State covering nearly all of the tracts selected by it as above described, by letter "F", dated December 15, 1909, you were advised that your action in approving the school selections in the face of

the selections of record was contrary to the regulations and practice of the Department and you were instructed to thereafter approve no application to make selection or entry of any lands for which an existing selection or entry remained intact on your records. By letter "F", dated December 18, 1909, your decision rejecting the company's re-arranged list was set aside and vacated, this office holding that you had no authority to reject the same, and that when such a list is filed in your office, you should note thereon the date of receipt and immediately forward it to this office.

* * * * *

The records of this office show the following selections and homestead applications in conflict with the company's selections first herein described:

State Indemnity School list 02604, covering all of Sec. 20, filed July 30, 1909, and approved August 19, 1909, * * * (And other selections and applications.)

The records of this office show that all vacant, unappropriated public lands in the township here in question were temporarily withdrawn by letter "E" dated March 21, 1905, for the proposed Shoshone National Forest, but that they were restored by the Secretary, June 19, 1907, and again became subject to settlement September 30, 1907, and to entry, October 30, 1907.

The township here involved is also noted on the tract book as withdrawn under the act of August 18, 1894 (28 Stat., 394), by letter "E" dated January

20, 1905, said withdrawal being based upon the Governor's application, dated July 5, 1901.

It is shown that the selections of the State now under consideration, have assigned as bases therefor, parts of sections 16 and 36 in townships within the Henry's Lake Forest Reserve, established May 23, 1905, now Targhee National Forest by President's Proclamation, effective July 1, 1908.

By letter, dated February 18, 1910, the resident attorneys for the railway company filed a brief in support of the selections of the company, in which they discussed the claims of the respective parties under the following propositions:

"1. By the action of the Idaho Legislature in March, 1909, the representatives of the State were absolutely prohibited from making selections as indemnity for Sections 16 and 36 on the ground that such sections had been included within forest reserves; and that the attempt in this case to make selections as indemnity for bases of that character was wholly unauthorized and void.

"2. Irrespective of the action of the Legislature above referred to, the attempt made by the State Board of Land Commissioners and its representatives to select the lands in controversy as indemnity for alleged losses of sections 16 and 36 included in forest reserves was, under the constitution and laws of Idaho as construed by the Supreme Court in the case of *Balderston v. Brady*, wholly unauthorized and void.

"3. There was a complete failure of compliance

on the part of the State with the essential requirements of the act of August 18, 1894, in the particulars which will be set forth in the course of the argument of this proposition; and in consequence thereof the act of 1894 never became operative upon the land here involved, and no rights accrued under said act. This point involves a number of subordinate propositions which will be considered in the course of the argument thereof.

"4. Unless the State is entitled to the land by virtue of a superior preference right obtained under the act of 1894, and a subsequent valid selection of the lands in dispute, then the Railway Company's selections are unquestionably valid, and it is entitled to patent for the land."

By letter, dated March 24, 1910, the Assistant Attorney General of the State of Idaho filed a brief in reply to that of the Railway Company, on April 29, 1910, the attorneys for the Company filed a brief in answer thereto, and, on May 20, 1910, the Assistant Attorney General for the State filed an answer to the second brief of the Railway Company.

With respect to the contention of the company that the State failed to comply with the requirements of said act of August 18, 1894, it may here be stated that the records of this office show that the application of the Governor of Idaho, under consideration, which was dated July 5, 1901, was filed in the office of the Surveyor General of Idaho, July 8, 1901, and by him forwarded to this office, by letter, dated July 10, 1901. The application on file here shows that it

was received, July 15, 1901. The proof of publication required by said act was filed in this office with the Governor's letter, dated August 18, 1904, and consists of a certified copy of an affidavit showing that publication was made in the Idaho State Tribune of Wallace, Idaho, commencing with the publication of July 10, 1901, and continuing to and including August 14, 1901.

By letter "E", dated January 19, 1901, addressed to the Surveyor General of Idaho, receipt was acknowledged of his letter dated July 10, 1901, inclosing the Governor's application, dated July 5, 1901. Directions were given to secure a statement, showing the total area of lands selected by the State, the approximate area of all the townships theretofore applied for by the Governor and also to report whether or not the total area of lands to which the State was entitled has been or might not be selected from the lands embraced in the townships already withdrawn. It was held that pending the receipt of a report from the Governor, no further action would be taken on the application for withdrawal for the reason that, in the opinion of the office, the areas embraced in the townships already withdrawn were sufficient to enable the State officers to make its requisite selections in full and that the public interests would not be subserved by further withdrawals of lands from settlement.

By letter "E", dated January 20, 1905, after referring to the Governor's application of July 5, 1901, and the lands included in his said application,

the local officers were instructed to withdraw from adverse appropriation by settlement or otherwise (except under rights that might be found to exist of prior inception) all the lands embraced in certain designated townships including that here in question for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plat of survey in the proper local land office.

A similar claim of the State to that here under consideration was the subject of departmental decision, dated April 29, 1913, (42 L. D. 118) on review, June 14, 1913 (42 L. D. 124), on appeal by the State of Idaho from the decisions of this office, dated August 23 and December 20, 1910, rejecting its school indemnity application, 02851, for certain tracts in T. 42, N. R. 4 E. for conflict with the selection of the Northern Pacific Railway Company list 33, under the act of March 2, 1899 supra. Said departmental decision, among other things, held that the withdrawal for the benefit of the State did not attach until July 15, 1901, the date the application was received in this office, and was not a bar to the reservation of the lands for forestry purposes, citing heirs of Irwin vs. State of Idaho, et al. 38 L. D. 219, and the opinion of the Attorney General, dated January 30, 1911, 39 L. D. 482.

This same application of the Governor of Idaho of July 5, 1901, under the said act of August 18, 1894, was involved in the case of Thorpe et al. v. State of Idaho, (35 L. D. 640) in which the Depart-

ment, in its decision, dated June 27, 1907, held (syllabus) that

"The filing on behalf of the State of an application for the survey of lands under the act of August 18, 1894, and the publication of notice thereof as provided by the act, operate as a withdrawal thereof, and all settlements made subsequently are subject to the preference right of the State."

"Notice to the local officers of the withdrawal of lands embraced in an application for survey by the State, as provided by the act of August 18, 1894, is intended primarily for their information, in order that proper notation may be made upon the records and is not essential to the protection of the rights of the state."

Substantially the same holding was made in *Williams vs. State of Idaho* (36 L. D., 20) on July 17, 1907. Motions for review of these decisions were denied June 4, 1908 (36 L. D. 479;481).

Upon the request of the State an order was issued suspending action upon said departmental decision of June 27, 1907, supra, pending a proposed adjustment of the claims of certain settlers, and the case again came before the Department March 22, 1913, upon the answer to the rule issued March 2, 1911, by the Secretary of the Interior inviting the State to show cause why certain school indemnity selections should not be rejected for invalidity of the bases assigned in support thereof. It was held by the department in its decision, dated March 22, 1913, (42 L. D. 15), syllabus:

"Whatever doubt and uncertainty existed concerning departmental decisions in Thorpe, et al. v. State of Idaho (35 L. D. 640; 36 L. D. 436), and Williams vs. State of Idaho (36 L. D. 20, 481), respecting the right of the State of Idaho to select indemnity in lieu of school sections within the Coeur d'Alene Indian reservation, because of the decision of the Supreme Court of that State in Balderston vs. Brady et al, 107 Pac. Rep. 493) holding that school sections within Indian and other reservations were not valid bases for indemnity, having been removed by enactments of the State Legislature of February 8 and March 4, 1911 (Laws of Idaho, 1911, pp. 16, 85) and the later decisions of the Supreme Court of the State in Rogers v. Hawley et al. (115 Pac. Rep. 687, 692) said departmental decisions are relieved from suspension and will be carried into effect."

The case of Thorpe et al. vs. State of Idaho again came before the Department, March 10, 1914, on appeal by the State from the Commissioner's decision, dated May 19, 1913, rejecting the State's school indemnity selections of certain lands in T. 44, N., R. 2 E., upon the ground that while, at the time the State's application was filed, the selection of lands by the State in lieu of school sections within Indian reservations was unquestionably permitted by the act of February 28, 1891 (26 Stat. 796), the status of such base lands was changed by the act of Congress, approved June 21, 1906 (34 Stat. 335), providing for the opening to entry and disposition of the Coeur d'Alene Indian reservation lands, as secs. 16 and 36 thereof were granted by that act to the

State of Idaho for the support of public schools.

The Department, in its said decision of March 10, 1914, again reviewed the proceedings had under said act of August 18, 1894, and the departmental decisions above cited, and held that the record showed that the action of the Commissioner in failing to note the withdrawal on his record was not due to inadvertence but to his deliberate judgment that the application for withdrawal should be denied; that, on July 19, 1901, the Commissioner refused to withdraw the townships in question upon the ground that the areas embraced in previous withdrawals were sufficient to enable the State to satisfy its several grants; that no appeal having been filed from the action of the Commissioner, his decision became final; that the decisions of the Supreme Court of Idaho in Balderston vs. Brady (107 Pacific 493) and Rogers vs. Hawley (115 Pac. 687) determine, beyond question, that the State selections had no validity until their ratification and confirmation by the act of February 8, 1911, supra; that this act had no retroactive effect and in nowise impaired the rights of *bona fide* settlers upon these lands whose claims had attached long before.

Even if it be assumed that a withdrawal existed for the benefit of the State, in this case, under the act of August 18, 1894, supra, from the date of the filing of the Governor's application in this office, July 15, 1901, until the expiration of the period of sixty days after the filing of the township plat, during which time the State might exercise the

preference right of selection accorded to it by said act, yet, it must be held under the authority of the departmental ruling of March 10, 1914, in said case of Thorpe et al. vs. the State of Idaho, that the State Board of Land Commissioners were without authority to relinquish Secs. 16 and 36 in forest and other reservations prior to the passage of the act of the Legislature of February 8, 1911; that consequently, the selections here in question were not, on July 30, 1909, when presented, supported by valid bases, and that the State failed to properly exercise the preference right of selection accorded to it under said act.

The State school selections here in question, not being supported by valid bases when presented, on July 30, 1909, are accordingly hereby held for cancellation, subject to the usual right of appeal, and without prejudice to the right of the State to waive the right of appeal and file new selections for the tracts here in question not in conflict with the claims of the railway company and homestead claimants, designating valid bases therefor.

The question of the validity of the railway company's selection of unsurveyed lands, under the provisions of the acts of July 1, 1898 (30 Stat. 597-620) and said act of March 2, 1899, of the same character as the selection here in question, is before the Department for consideration in the case of Hanson, et al. vs. Northern Pacific Ry. and John Landers, et al. vs. said Company. Action upon the conflicting claims of the Railway Company and the

homestead settlers above mentioned will therefore, be suspended until the Department rules upon the question presented in the cases above referred to.

Notify the proper officers of the State of the action here taken and the representatives of the homestead claimants, and, in due time, report, observing circular of March 1, 1900, (29 L. D. 649). The resident attorneys for the Railway Company will be notified hereof by this office.

Very respectfully,

(Signature illegible)

Commissioner.

Exhibit 2-B, introduced by plaintiff consists in part of the following:

Department of the Interior,
General Land Office.

Oct. 1, 1915.

WHEREAS, by the Act of Congress approved July 2, 1864 (13 Stat., 365), entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route," and Joint Resolution of May 31, 1870 (16 Stat., 378), there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and branch, to the Pacific Coast, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate

sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office;" and

WHEREAS, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the first named act, have reported to him that the said Northern Pacific Railroad and Telegraph Line, and Branch, excepting that portion between Wallula, Washington, and Portland, Oregon declared forfeited by the Act of September 29, 1890 (26 Stat., 496), have been constructed and fully completed and equipped in the manner prescribed by the Act relative thereto, and the same accepted; and

WHEREAS, by the Act of Congress approved March 2, 1899 (30 Stat., 993), authority is given the Northern Pacific Railroad Company, now Northern Pacific Railway Company, to release and convey by proper deed to the United States the land within Mount Rainier National Park and Pacific Forest Reserve theretofore granted to said company, whether surveyed or unsurveyed, and to select in lieu thereof an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual Government survey thereof, lying within any State into or through which the railroad of said Company runs; and it is provided that patent shall issue to said Company for lands so selected: and

WHEREAS, the said lands lying within the

said Mount Rainier National Park and Pacific Forest Reserve, and the limits of the grant to said Railroad Company, have been duly released to the United States by the Northern Pacific Railroad Company, the Northern Pacific Railway Company, and the Central Trust Company of New York, and the release has been accepted by the Secretary of the Interior; and

WHEREAS, there has been filed in the office of the Secretary of the Interior evidence showing that the Northern Pacific Railway Company is the lawful successor in interest to the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the act of July 2, 1864, and all subsequent legislation; and

WHEREAS, the following described selected lands have been duly selected by the authorized agent of the Northern Pacific Railway Company, under the provisions of the Act of March 2, 1899, aforesaid, and the lands given as base therefor; the Mount Rainier National Park and former Pacific Forest Reserve, are within the primary limits of the company's grant and lie opposite the constructed line of its road, and are also within the limits of the reserve to the United States as aforesaid, to-wit:

(Here follows description of a number of tracts of land, aggregating 47.75 acres, including all of Section 20, Township 43, Range 4, 640 acres.)

RAILROAD GRANTS AND RIGHT OF WAY DIVISION

August 9, 1915.

It is hereby certified that the foregoing list has been examined in connection with the plats of record in this office, and that the tracts

therein described are vacant and unappropriated public lands and subject to approval and patent to the now Northern Pacific Railway Company under the act of March 2, 1899 (30 Stat. 993); that on September 19, 1912, the Department held that, under the adjustment of the company's claim, it is entitled to select 448,222 acres under the said act of March 2, 1899, and is relieved from the requirement of designating a tract for tract base therefor; that there has been heretofore patented to the company, under this adjustment, 378,947.95 acres, of which 2,462.37 acres have been recovered to the United States, leaving 376,485.58 acres of the base satisfied.

It is further certified that the tracts included in this list that are included in the act of February 26, 1895 (28 Stat., 683), and the supplemental act of June 25, 1910 (36 Stat., 379), were classified and approved as non-mineral; that all these tracts were classified as non-mineral as shown by the field notes of the General Land Office thereof, and have been reported on by the Geological Survey as containing no valuable deposits of coal or other minerals, and as having no valuable power site or reservoir possibilities.

Approved:

(Signed) WALTER S. BINLEY,
 (Signed) F. R. DUDLEY Examiner.
 Chief of Division.

ACCOUNTS DIVISION

September 24, 1915.

Expense of survey and office work on land described in the foregoing list:

Railroad selections,	4,700.75 acres
----------------------	----------------

Field work	\$215.21
Office work at 1c per acre	47.01
Total	\$262.22

Act of June 25, 1910

not involved.

(Signed) FREDERIC NEWHUGH,
Chief of Division.

Now, Therefore, as it has been found that the foregoing selected lands, being a part of the 448,222 acres to which the Northern Pacific Railway Company is entitled under the act of March 2, 1899, on account of its relinquishment accepted and approved July 26, 1899, of the lands lying within the primary limits of its grant and also within the Mt. Rainier National Park and Pacific Forest Reserve, are, so far as the returns to the General Land Office show, free from adverse claims and appear to be of the character contemplated by the said act of March 2, 1899, and to be subject to patent thereunder, and no objection appearing of record in this office, it is hereby recommended that the said selected tracts containing four thousand, seven hundred acres and seventy-five hundredths of an acre, be approved and patented to the said Northern Pacific Railway Company, the patent to contain a reservation in accordance with the proviso to the act of August 30, 1890 (26 Stat., 391).

(Signed) C. M. BRUCE,
Acting Commissioner.

To the Honorable
Secretary of the Interior.

Pat. No. 532360

June 6, 1916.

Department of the Interior,
Washington, D. C.
Oct. 4, 1915.

Approved: covering four thousand, seven hundred acres and seventy-five hundredths of an acre.

(Signed) ANDRIEUS A. JONES,

First Assistant Secretary of the Interior.

"B" List 425.

Exhibit "2-C" introduced by plaintiff, consists in part of the following:

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY COMPANY
List No. 71.

State of Idaho.

U. S. Land Office at Coeur d'Alene.

The Northern Pacific Railroad Company and the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, having executed and delivered to the United States their certain deed, dated July 19, 1899, conveying and relinquishing to the United States certain lands situated within the limits of the Mount Rainier National Park and the Pacific Forest Reserve, as defined by the Act of Congress entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as

the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," which Act was approved March 2, 1899, in pursuance of said Act of Congress above mentioned, now, by virtue of the right conferred upon the said Northern Pacific Railroad Company by said Act of Congress approved March 2, 1899, the said Northern Pacific Railway Company as the successor in interest of the Northern Pacific Railroad Company, hereby selects the lands hereinafter specified in lieu of a like quantity of lands so relinquished and conveyed. The descriptions hereinafter set opposite the lands selected being assigned as the particular bases for the tracts hereby selected.

All the lands hereby selected are situated within the Coeur d'Alene land district, in the State of Idaho.

LIST OF LANDS North of base line and East of Boise principal meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park", in lieu of lands set opposite thereto, relinquished under said Act of March 2, 1899.

PART OF SECTION	SEC.	TOWN	Range	Acres	100ths	AREA		REMARKS
						N	E	
*	*	*	*	*	*	*	*	*
8 All	*	20	43	4	640	*	*	*

The following tracts which when surveyed will be described as follows:

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

PART OF SECTION	Sec.	Town	Range	Acres	100ths	REMARKS
The following tracts which when surveyed will be described as follows:						
*	*	*	*	*	*	*
*	*	*	*	*	*	*
8	All	21	17	8	640	*
*	*	*	*	*	*	*
*	*	*	*	*	*	*
*	*	*	*	*	*	*
*	*	*	*	*	*	*

State of Minnesota,
County of Ramsey,—ss.

I, Wm. H. Phipps, being duly sworn, de-
pose and say: That I am the Land Commis-
sioner of the Northern Pacific Railway Com-
pany, the successor in interest of the North-
ern Pacific Railroad Company; that the lands
described in the foregoing list, and which are
hereby selected by the Northern Pacific Rail-
way Company, under the Act of Congress ap-
proved March 2, 1899, entitled, "An Act to set
aside a portion of certain lands in the State
of Washington, now known as the Pacific For-
est Reserve, as a public park, to be known as
the Mount Rainier National Park," and all of
them, are vacant unappropriated lands of the
United States, not reserved, and to which no
adverse right or claim has attached, and have
been found, upon examination, to be non-min-
eral in character; and said lands, and all there-
of, are of the character contemplated by said
Act of Congress approved March 2, 1899; and
that the specific lands heretofore relinquished
and conveyed to the United States by said
Northern Pacific Railway Company, as suc-
cessor in interest of the Northern Pacific Railroad
Company, in lieu of which the lands here-
in described are selected, are truly set
forth and described in this list, and no selec-
tion has heretofore been made in lieu of any of
the lands herein specified as the basis for the
lands hereby selected.

Subscribed and sworn to before me this
8th day of July, 1901.

W. F. VON DEYN,
Notary Public, Ramsey County, Minnesota.
(Notarial Seal.)

U. S. Land Office at Coeur d'Alene, Idaho,
Sep. 25, 1901.

We hereby certify that we have carefully

examined the foregoing selection list filed by the Northern Pacific Railway Company, as the successor of the Northern Pacific Railroad Company, under the Act of Congress approved March 2, 1899, entitled, "An act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and have critically examined the plats and records of this office, and that the lands selected appear by the records of this office to be subject to such selection; and said lands, and all of them, are public lands of the United States, not reserved, and to which no adverse right or claim has attached. We have therefore approved the foregoing list and the selection of the lands therein described, and have made due notation thereof upon the records of this office.

It is further certified that the foregoing list shows an assessment of the fees payable hereunder, and that said Northern Pacific Railway Company has paid to the undersigned, the receiver, the full sum of fifty-eight dollars in full payment and discharge of said fees.

(Signed) D. H. BUDLONG, Register.

(Signed) C. D. WAMER, Receiver.

(The foregoing list No. 71 is endorsed as follows:)

Filed July 23, 1901.

(Signed) D. H. BUDLONG,
Register.

Approved Sept. 25, 1901.

June 4, 1909.

Serial No. 02484.

71-14

Act of March 2nd, 1899,

Describing Anew the Lands Selected in
Coeur d'Alene List No. 71 (In Part),
So as to Conform With the United States Survey
Thereof.

Filed June 4, 1909. Approved 190...

Land Department
Northern Pacific Railway Co.
List No. 71 (In Part)

Of Selections of Public Lands Made by the
Northern Pacific Railway Company
As Inuring to It Under Grants of July 2, 1864, and
May 31, 1870, in the

Coeur d'Alene U. S. Land District, Idaho.

Coeur d'Alene List No. 71 (In Part.)

WHEREAS, by authority granted by an act of Congress entitled, "An act to set aside a portion of certain lands in the state of Washington, now known as the Pacific Forest Reserve as a public park, to be known as the Mount Rainier National Park," approved March 2, 1899, the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, did on the twenty-third day of July, A. D. 1901, select in the United States District Land Office at Coeur d'Alene certain lands in township 43 North, range 4 east, Boise Meridian, as described in its selection list numbered 71, which said lands at the date of said selection were unsurveyed public lands; and

WHEREAS, by section four (4) of the act of congress hereinbefore referred to, it is provided that in case the lands selected thereunder be unsurveyed at the date of said selection, the company selecting the same shall within a period of three months after the lands so selected

have been surveyed and plats thereof filed by said local land office, file a new list describing the lands selected according to the Government survey.

NOW THEREFORE, in conformity with this provision and for the purpose of so describing said lands selected that they will conform to the government descriptions thereof according to said survey, the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, does hereby describe anew the lands included in said selection list as follows, to-wit:

LIST OF LANDS North of base line and East of Boise principal meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled, "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," in lieu of lands set opposite thereto, relinquished under said act of March 2, 1899."

PART OF SECTION.	Sec.	AREA Town. N	Range. E	Acres.	100th.	REMARKS
8 All	20	43	4	640	*	*

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled, "An act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

The foregoing list designating anew so as to conform with the public survey thereof, the lands selected in

Coeur d'Alene List No. 71 (In Part)
was filed in this office by the Northern Pacific Railway Company on the day of A. D. 1909.

Register.

Receiver.

DEPARTMENT OF THE INTERIOR,
United States Geological Survey.
Washington.

May 13, 1915.

Office of the Director.

The Commissioner,
General Land Office.

In reply to your letter of February 13, 1915 (Coeur d'Alene 02484 "F" Sel 71), requesting information relative to the mineral character and power-site or reservoir possibilities of the following lands in Idaho, included in Northern Pacific Railway Company selection:

T. 43 N., R. 4 E., Sec. 6, lots 6 and 7,

E $\frac{1}{2}$ of SW $\frac{1}{4}$;

Sec. 7, W $\frac{1}{2}$, W $\frac{1}{2}$ of E $\frac{1}{2}$;

Sec. 17, S $\frac{1}{2}$ of NW $\frac{1}{4}$, S $\frac{1}{2}$;

Sec. 18, all;

Sec. 19, all;

Sec. 20, all;

Sec. 29, W $\frac{1}{2}$;

Sec. 30, E $\frac{1}{2}$.

The records of the Survey indicate that there are no valuable deposits of coal or other minerals within the area specified, and that the lands have no valuable power-site or reservoir possibilities.

H. C. RIZER (Signed)

Acting Director.

31-1

May 18, 1915 JFE

DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington.

June 28, 1915.

Promulgating departmental decision, canceling state
selections, etc.

State of Idaho,
Heirs of Charles E. Everson
and Martin Groundwater, Guar.
of John G. Groundwater,

v.

Northern Pacific Ry. Co.
Register and Receiver,
Coeur d'Alene, Idaho.

Sirs:

In reference to the above entitled case, involving lands in T. 43, N., R. 4 E., B. M., Idaho, you are advised that the decision of the Secretary of the Interior, dated January 19, 1915, has become final. A copy of said decision is herewith inclosed for your information and for your files.

Said decision affirmed, upon the authority of the case of Thorpe et al. v. State of Idaho (43 L. D., 168), and the case of McDonald v. Northern Pacific Railway Company, decided October

30, 1914 (unreported), the decision of this office, dated July 16, 1914, holding the State school indemnity selections, hereinafter more particularly described, for cancellation, subject to the usual right of appeal, and without prejudice to the right of the State to waive the right of appeal and file new selections for the tracts here in question not in conflict with the claims of the railway company and homestead claimants, designating valid bases therefor. It was also held that action upon the conflicting claims of the railway company and the homestead settlers therein mentioned would be suspended until the Department had ruled upon the questions therein presented.

The school indemnity selection lists involved are as follows:

State list 02700, covering all of Sec. 6, except lots 1 & 2;

State list 02705, covering all of Sec. 7;

State list 02708, covering the W $\frac{1}{2}$ and SE $\frac{1}{4}$, Sec. 17, W $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 29, and N $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 33;

State list 02706, covering all Sec. 18;

State list 02704, covering all Sec. 19;

State list 02604, covering all Sec. 20; and

State list 02699, covering the NE $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 30, and NW $\frac{1}{4}$ Sec. 31.

In accordance with the terms of said departmental decision and said office decision of July 16, 1914, the State selections described are hereby canceled and you are directed to make proper notation thereof on your records. The conflicting claims of the railway company and of the heirs of Charles E. Everson and Martin Groundwater, as the Guardian of John G. Groundwater, will be separately considered, the questions involved and referred to in said decision

of July 16, 1914, having now been decided by the Department.

Notify the proper officers of the State and the representatives of the homestead claimants of the action herein taken. The resident attorneys for the railway company will be notified hereof of by this office.

(Signed.) Very respectfully,
 CLAY TALLMAN,
 Commissioner.

Plaintiff's Exhibit "2-D" is in part as follows:

**DEPARTMENT OF THE INTERIOR,
United States Land Office.
Coeur d'Alene, Idaho, Aug. 31' 1909.**

Belden M. Delaney, Esq.,
Clarkia, Idaho.

Dear Sir:—

You are hereby notified that your homestead application serial No. 02539, filed June 10, 1909, for the NE $\frac{1}{4}$, Sec. 20, T. 43, N., R. 4, E. B. M. is hereby rejected for the reason that the same is all in conflict with the selection by the State of Idaho.

30 days are allowed in which to appeal to the Commissioner of the General Land Office.

Yours truly,
W. H. BATTING,
Register.

**DEPARTMENT OF THE INTERIOR,
General Land Office.**

Washington, December 16, 1909.

In re rejected homestead application.

**Mr. B. M. Delaney,
Saint Maries, Idaho.**

Sir:

I am in receipt of your letter of November 15, 1909, in the nature of an appeal from the action of the local officers at Coeur d'Alene rejecting your application filed June 10, 1909, to make homestead entry for the N. E. $\frac{1}{4}$ of Sec. 20, T. 43, N. R. 4, E. B. M., because of conflict with school indemnity selection of the State of Idaho. It is gathered from your letter that for about six years you have worked in that region of country which embraces the particular township wherein said NE $\frac{1}{4}$ of Sec. 20 lies, and that you have placed some improvements on the particular tract in question.

It appears, however, that said T. 43, N. R. 4 E. with a number of others was withdrawn from settlement or other appropriation adverse to the state, under date of July 5, 1901, upon application of the Governor of Idaho, under the act of August 18, 1894 (28 Stats. 394). The language of the statute is in part as follows:

"And the lands that may be found to fall in the limits of such townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office."

Unless therefore, it could be shown that you were

a settler on said NE $\frac{1}{4}$ of Sec. 20, prior to the date of the application for the withdrawal by the Governor, the State's rights to said tract, under its indemnity selection, is superior to yours, and since it appears that at the date of your application, said tract was covered by the State's list, your application was properly rejected by the local officers.

Very respectfully,

FRED DENNETT,

Commissioner.

Serial No. 02539.

DEPARTMENT OF THE INTERIOR,
United States Land Office.

At Coeur d'Alene, Idaho.

The annexed papers were filed the day and hour noted thereon.

Rejected Nov. 27, 1912, because homestead application was rejected for conflict with State selection. No appeal taken. No proof of publ.

W. H. BATTING,

Register.

WILLIAM ASHLEY,

Receiver.

Notice, etc.

Feb. 25, 1913, Proof finally rejected.

S-41

In reply please refer to "F" Coeur d'Alene 02539
WJI

1xB&G

1xS&H

WJI DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington.

July 9, 1915.

Address only the
Commissioner of the General
Land Office.

B. M. Delaney

vrs.

Northern Pacific Ry. Co.
Register and Receiver,
Coeur d'Alene, Idaho.

Sir:

Homestead Application Held for Rejection.

June 10, 1909, B. M. Delaney filed his homestead application for the NE $\frac{1}{4}$ of Sec. 20, T. 43 N., R. 4 E., Idaho, alleging settlement thereon, June 21, 1908, which application was rejected by you for conflict with state selection for indemnity school purposes and with selection of the Northern Pacific Railway Company, list 71.

Letter of November 15, 1909 in the nature of an appeal from your action in rejecting said application was transmitted to this office.

The plat of survey of said T. 43 N., R. 4 E., was approved, November 24, 1908 and filed in the local office, June 4, 1909.

The State of Idaho filed indemnity school selection, list 02604, August 19, 1909, including said NE $\frac{1}{4}$, claiming a preference right under the act of August 18, 1894 (28 Stat., 394), which list was canceled June 28, 1915.

July 23, 1901, the Northern Pacific Railway Company selected said NE $\frac{1}{4}$ with other lands per list 71, under the act of March 2, 1899 (30 Stat., 993). June 4, 1909, the Railway Company filed a re-arranged list describing the tracts according to the government survey, as required by said act of March 2, 1899.

Inasmuch as the land was duly selected by the

Railway Company prior to the date of the alleged settlement and date of filing the application and conformed to the survey within the time allowed, it was not subject to entry at the time the application was filed, Frank O. Daniel vs. Northern Pacific Railway Company (43 L. D., 381.)

Your action in rejecting said application is hereby sustained, subject to the usual right of appeal.

The resident attorneys for the Company and applicant will be notified direct by this office.

Very respectfully,

C. M. BRUCE (Signed)

Assistant Commissioner.

D-31156

DEPARTMENT OF THE INTERIOR,

Washington, November 18, 1915.

Belden M. Delaney

vs.

Northern Pacific
Railway Company.

"P"

Coeur d'Alene 02539
Homestead application held
for cancellation.

Affirmed.

Decision promulgated

Nov. 22, 1915.

APPEAL FROM THE GENERAL LAND OFFICE

By its decision of July 9, 1915, the General Land Office held for cancellation the homestead application of Belden M. Delaney, Coeur d'Alene 02539, for the N. E. 1/4 Sec. 20, T. 43, N. R. 4 E., for the reason that his settlement, upon which his application to

enter was based, was not made until after the Northern Pacific Railway Company had filed its selection list No. 71, Coeur d'Alene 02484, for the same land, under the Act of March 2, 1899 (30 Stat. 1095).

In his appeal Delaney urged that the selection did not defeat his settlement because it was erroneously received and filed in the local office, and is inoperative for the reason that an application had been made by the State of Idaho, prior to the date on which the list was filed, for the survey of the township in which the land is located, under the act of August 18, 1894 (28 Stat. 394) and was pending at the time the list was filed, and therefore, prevented the acceptance and filing of the list.

This contention is contrary to the holding of this Department in the closely kindred case of *Swanson v. Northern Pacific Railway Company* (37 L. D. 74).

The decision in that case is in harmony with the established practice of the land department, which sanctions the receipt and filing of applications for lands while they are subject only to mere preferred rights and appropriations. (*Stewart v. Peterson*, 28 L. D. 515, 519).

But aside from this consideration, the rejection of the application in this case is supported by the reasons given by this Department in its decision in the cases of *Thorpe et al. v. Northern Pacific Railway Company* (43 L. D. 167) *F. O. Daniels v. The Northern Pacific Railway Company* (43 L. D. 381), and *George A. McDonald v. The Northern Pacific Railway Company* (D-15548) involving Lewiston 02620,

decided October 30, 1914 (unreported) wherein the issues and facts presented were very similar to those presented in this case.

The decision appealed from is affirmed and the case remanded with directions that Delany's application to enter be finally rejected.

(Signed.)

ANDRIEUS A. JONES,
First Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
Washington.

January 29, 1916.

D-31156

Belden M. Delany

vs.

Northern Pacific Railway Co.

"F"

Coeur d'Alene, 02539

Motion for rehearing.

Denied.

MOTION FOR REHEARING IN RE DEPARTMENTAL DECISION OF NOVEMBER
18, 1915.

Motion for rehearing has been filed on behalf of the above plaintiff of departmental decision of November 18, 1915, wherein the Department affirmed the action of the Commissioner rejecting his homestead application for conflict with a selection by the Northern Pacific Railway Company for the same lands, under the act of March 2, 1899. (30 Stat., 1095).

The questions raised in the motion for rehearing

were all considered by the Department, and disposed of in the decision complained of, and no further discussion of the facts is deemed necessary.

The motion for rehearing is accordingly denied.

(Signed.)

ANDRIEUS A. JONES,

First Assistant Secretary.

DEPARTMENT OF THE INTERIOR,

General Land Office,

Washington.

February 11, 1916.

Departmental Decision Promulgated.

Register and Receiver,

Coeur d'Alene, Idaho.

Sirs:

I enclose herewith a copy of Departmental decision of January 29, 1916, denying the motion for rehearing of departmental decision of November 18, 1915, which affirmed office decision of July 9, 1915, holding for rejection the homestead application of Belden M. Delany, for the NE $\frac{1}{4}$ Sec. 20, T. 43 N., R. 4 E., Idaho, for conflict with the selection of the Northern Pacific Railway Company, per list 71.

The homestead application of Delany is hereby finally rejected, and you will so note upon the records of your office.

The resident attorneys for the company and the applicant will be notified direct by this office.

Very respectfully,

(Signed.)

C. M. BRUCE,

Assistant Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington.

March 11, 1916.

D-31156

Belden M. Delany

vs.

Northern Pacific Railway Co.

"F"

Coeur d'Alene 02513

Petition Denied.

PETITION TO THE SUPERVISORY POWER.

Belden M. Delany filed petition for exercise of supervisory power of the Secretary of the Interior to vacate and recall departmental decision of November 18, 1915, and that of January 29, 1916, denying his motion for rehearing in the case between him and the Northern Pacific Railway Company, involving his settlement claim to NE. 1/4, Sec. 20, T. 43 N., R. 4 E., B. M., Coeur d'Alene, Idaho, on the ground of the railway company's prior right as selector.

The ground of the petition is that the selection of the land in terms of a future survey made in the company's prior selection is illegal and void under the clear and unmistakable language in the decision in *Daniels v. Northern Pacific Ry. Co.* (43 L. D., 381). There is also a contention that the Northern Pacific Railroad Company had been foreclosed and had gone out of existence before this selection was made and before the act of March 2, 1899 (30 Stat., 993), wherefore it is claimed the act was ineffective for want of an existing grantee.

Counsel misinterprets the decision in 43 L. D., 381, referred to. The Department held that:

Not only have descriptions of unsurveyed land in terms of a future survey been recognized in departmental practice, but, as has been stated, such descriptions are required by the regulations now in force as an essential part of the description in all applications for unsurveyed land. Indeed, in the instructions of May 9, 1899 (28 L. D., 521), under the act of June 4, 1897, *supra*, was incorporated a provision broad enough to cover all selections of unsurveyed land under any act of Congress in which the only requirement as to description was that the land should be designated according to the description by which it would be known when surveyed, if that be practicable.

The act of March 2, 1899, authorized the railroad company to make selections of unsurveyed public lands. Section 4 requires that in case the tract selected should at the time of the selection be unsurveyed the list filed by the company in the local land office should describe the tract "in such manner as to designate the same with a reasonable degree of certainty," and requires a new list to be filed redescribing the land after the survey has been made. The description employed in this particular selection, under the decision in *Daniels v. Northern Pacific Railway Company*, *supra*, complied with the statute as it was made with a reasonable degree of certainty. The petitioner's contention as to this feature of the case is accordingly not well founded.

The second point of contention, if conceded, would

work ruin over the entire northwest in all the states through which the Northern Pacific Railway Company passes. It would nullify the acts of March 2, 1899, and July 1, 1898 (30 Stat., 620), for both acts name the Northern Pacific Railroad Company as authorized thereby to make selections. It is true the railroad company had ceased to be an active corporation by foreclosure of all its rights and franchises and sale to its bondholders who reorganized under the name of the Northern Pacific Railway Company, and that company, as successor to the railroad company, has been recognized in the opinion of the Attorney General, February 6, 1897 (21 Op., 486), and March 18, 1905, referred to in departmental decision (33 L. D., 636). It has also been recognized in numerous departmental decisions, among which are Furgeson v. Northern Pacific Ry. Co. (33 L. D., 634, 636); Jones v. Northern Pacific Ry. Co. (34 L. D., 105, 106); Northern Pacific Ry. Co. vs. Santa Fe Pacific R. R. Co. (36 L. D., 368, 369); Vold v. Northern Pacific Ry. Co. (30 L. D., 378); Duba v. Northern Pacific Ry. Co. (42 L. D., 464-5).

The Department will not now hold that the act of March 2, 1899, *supra*, was void because no such corporation as the Northern Pacific Railroad Company was then a going concern.

The petition is denied.

(Signed.)

ANDRIEUS A. JONES,
First Assistant Secretary.

The papers constituting a part of Plaintiff's Ex-

hibit 2-D above copied, and other papers which are a part of that exhibit and which it is not deemed necessary to include in this abstract, sufficiently show that the official plat of the survey of the township in which the land in controversy was situated, was filed in the local land office at Coeur d'Alene, Idaho, on June 4, 1909; that on June 10, 1909, Belden M. Delany made application to enter the land in controversy as a homestead, alleging that he made settlement on said land June 21, 1903; that said application was rejected by the Register and Receiver of said Coeur d'Alene land office; that on August 31, 1909, the said Register addressed to said Delany the notice of rejection bearing that date which is copied above; that Delany thereafter appealed to the Commissioner of the General Land Office; that said Commissioner, acting on this appeal and by the decision of July 9, 1915, which is copied above, affirmed the action of the Register and Receiver and rejected Delany's application; that thereafter Delany appealed to the Secretary of the Interior from said decision of the Commissioner of the General Land Office, and by decision of November 18, 1915, copied above, the Secretary affirmed the decision of the Commissioner appealed from; that Delany thereupon moved the Secretary of the Interior for a rehearing, and by the decision of January 29, 1916, copied above such motion was denied by the Secretary; and that thereafter Delany petitioned the Secretary of the Interior for the exercise of his supervisory power, and such peti-

tion was denied by the Secretary's decision of March 11, 1916, copied above.

Defendant's Exhibit No. "1" is as follows:

Patent No. 108.

Northern Pacific Railway Lands.

Act March 2, 1899.

Coeur d'Alene and Lewiston Land Districts, Idaho.

THE UNITED STATES OF AMERICA

To all to whom these presents shall come, greeting:

WHEREAS, by the act of Congress approved July 2, 1864, (13 Stat., 365), entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route," and the Joint Resolution of May 31, 1870 (16 Stat., 378), there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and branch, to the Pacific Coast, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office;" and

WHEREAS, official statements from the Secretary

of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the first named act, have reported to him that the said Northern Pacific Railroad and Telegraph Line, and Branch, excepting that portion between Wallula, Washington, and Portland, Oregon, declared forfeited by the Act of September 29, 1890 (26 Stat., 496), have been constructed and fully completed and equipped in the manner prescribed by the Act relative thereto, and the same accepted; and

WHEREAS, by the Act of Congress approved March 2, 1899 (30 Stat., 993), authority is given the Northern Pacific Railroad Company, now Northern Pacific Railway Company, to release and convey by proper deed to the United States the land within Mount Rainier National Park and Pacific Forest Reserve, theretofore granted to said Company, whether surveyed or unsurveyed, and to select in lieu thereof an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual Government survey thereof, lying within any State into or through which the railroad of said Company runs; and it is provided that patent shall issue to said Company for lands so selected; and

WHEREAS, the said lands lying within the said Mount Rainier National Park and Pacific Forest Reserve, and the limits of the grant to said Railroad Company, have been duly released to the United States by the Northern Pacific Railroad Company, the Northern Pacific Railway Company, and the Central Trust Company of New York, and the release has been accepted by the Secretary of the Interior, and

WHEREAS, There has been filed in the office of the Secretary of the Interior evidence showing that the Northern Pacific Railway Company is the

lawful successor in interest to the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the Act of July 2, 1864, and all subsequent legislation; and

WHEREAS, the following described selected lands have been duly selected by the authorized agent of the Northern Pacific Railway Company under the provisions of the Act of March 2, 1899, aforesaid, and the lands given as base therefor, the Mount Rainier National Park and former Pacific Forest Reserve, are within the primary limits of the Company's grant, and lie opposite the constructed line of its road, and are also within the limits of the reserve to the United States, as aforesaid, to-wit:

Boise Meridian—Idaho.

Township forty-three north of Range four east. *** Section twenty. *** (And other lands.)

Containing in the aggregate four thousand one hundred forty-two and sixty-seven-hundredths acres:

NOW KNOW YE, That the United States of America, in consideration of the premises, and pursuant to said Acts of Congress, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, its successors and assigns, the tracts of land selected as aforesaid and embraced in the foregoing; TO HAVE AND TO HOLD the said tracts, with the appurtenances thereof, unto the said Northern Pacific Railway Company, successor as aforesaid, and to its successors and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water

rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

This patent is issued in lieu of patent No. 493369, dated October 11, 1915, which has been canceled because of an error in the description.

IN TESTIMONY WHEREOF, I, Woodrow Wilson President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

(SEAL.) Given under my hand, at the City of Washington, the Sixth day of June in the year of our Lord one thousand nine hundred and Sixteen and of the Independence of the United States the one hundred and Fortieth.

By the President: Woodrow Wilson

By M. P. LeRoy, Secretary.

L. I. C. LAMAR,

Recorder of the General Land Office.
Record of Patents,
Patent Number 532360.

Defendant's Exhibit No. "2" is as follows:

DEPARTMENT OF THE INTERIOR

General Land Office,

Washington, D. C., January 20, 1905.

Subject:

Notice of withdrawal of lands under Governor's application for survey under Act of August 18, 1894.

Register and Receiver,
Coeur d'Alene, Idaho.

Sirs:

With the letter of the Governor of Idaho, dated August 18, 1904, was received at this office a copy of "Notice for survey of lands," dated Boise, Idaho, July 6, 1901, as applied for by F. W. Hunt, Governor, under act of August 18, 1894, the townships being designated as follows:

Townships 40, 41 and 42 north, Range 5 east;
" 41 and 42 north; Range 4 east;
" 43 north, ranges 2, 3 and 4 east;
" 44 north, ranges 2, 3, 4 and 5 east;

Of said designated townships 41 north, range 4 east; 43 north, ranges 2 and 3 east, and 44 north, range 2 east were withdrawn from further disposal by settlement or otherwise per office letter "E" of March 29, 1899, to the proper district land officers. Except as stated the townships designated in the Governor's application of July 6, 1901, were not heretofore withdrawn. Township 45 north, range 5 east, and embraced in contract No. 250, was withdrawn March 29, 1899.

Under date of December 20, 1904, the State of Idaho made special deposit of \$20,000, under the act of August 18, 1894, to cover the cost of surveys embraced in applications for survey as made by the Governor; and the surveys were embraced in contracts Nos. 249 and 250, awarded Messrs. G. R. and W. A. B. Campbell and Charles L. Campbell, D. S., respectively; liabilities payable from the stated deposits; contracts approved January 18, 1905.

You are hereby instructed to give public notice, by posting in your office and as a matter of information to newspapers published in the vicinity, that the lands embraced in townships 41, 42, 43 and 44 north, range 6 east; 41 north, range 5 east; 42 north, range 5 east; and 43 and

44 north, range 4 east, are reserved from any adverse appropriation by settlement or otherwise (except under rights that may be found to exist of prior inception) from and after the date of the approval of said contracts Nos. 249 and 250, namely, January 18, 1905, and for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plats of the survey of the designated townships in your office or the proper local land office, during which period the State authorities may select any of the lands situate in said townships which are not embraced in any adverse claim.

A letter similar to this has been addressed to the district land officers at Lewiston the lands being situate in the two districts.

Note on your records the suspension of such of the designated townships as are situate within your district, and acknowledge receipt hereof.

You will observe from the foregoing statements that under the Governor's application of March 15, 1899, the following designated townships (and partially embraced in the two awarded contracts), were withdrawn from disposal by settlement or otherwise March 29, 1899, by letter "E" to the respective district land officers, viz:

Townships 41 north, ranges 3 and 4 east; 42 and 43 north, ranges 2 and 3 east; 44 north, ranges 1 and 2 east; and 45 north, ranges 3, 4, and 5 east.

Very respectfully,

W. A. RICHARDS,
Commissioner.

Defendant's Exhibit No. "3" is as follows:

DEPARTMENT OF THE INTERIOR
Washington.

D-15548

October 30, 1914.

George A. McDonald,

v.

Northern Pacific Railway
Company, and State of
Idaho.

Decision Promulgated
Nov. 13, 1914.

"F"

Lewiston 02620.
State selection and home-
stead application rejected.
Affirmed.

APPEAL FROM THE GENERAL LAND OFFICE

On July 11, 1901, the Northern Pacific Railway Company applied to select under the act of March 2, 1899, (30 Stat. 993), the S $\frac{1}{2}$, SE $\frac{1}{4}$, Sec. 30, and N $\frac{1}{2}$, NE $\frac{1}{4}$, Sec. 31, T. 42, N., R. 4 E., Lewiston, Idaho, land district. Prior to the filing of this application, to-wit, July 6, 1901, the State of Idaho, through its Governor, applied to have the lands in this township surveyed, and also on the same date filed an application for the withdrawal of these lands from all forms of settlement and entry, under the act of August 18, 1894 (28 Stat. 394).

Upon consideration of this application, the Commissioner of the General Land Office refused to make said withdrawal upon the ground that sufficient land had already been withdrawn to satisfy the State's claim. Subsequently, and on January 20, 1905, the Commissioner considered the application filed by the State, and

withdrew the land for the state. The township plat was filed in the local office July 1, 1909, and the Railway Company's selection was adjusted to these lines of survey. On the date the township plat was filed, George A. McDonald filed application to make homestead entry of said tract, and on August 27, 1909, the State filed its selection.

The land was temporarily withdrawn for forestry purposes March 31, 1905, and was included in a forest withdrawal in 1906. On the foregoing statement of facts, the Commissioner in his decision of December 20, 1910, rejected the State's application upon authority of the decision of his office rendered December 20, 1909, in the case of the State of Idaho v. Northern Pacific Railway Company, wherein he held that the act of the legislature of the State of Idaho prohibited the use of Sections 16 and 36 as bases for lieu selections. Said decision also held the application of McDonald for rejection because of conflict with the prior selection of the Northern Pacific Railway Company. From this action the State has appealed.

Until January 20, 1905, the lands under consideration, occupied the status of those involved in the case of Thorpe et al. v. State of Idaho (43 L. D. 168), wherein the Department upheld the authority of the Commissioner to refuse to make the withdrawal for the State. It follows, therefore, that the withdrawal on behalf of the State did not take effect until January 20, 1905, as the doctrine of relation cannot be applied where the Commissioner advisedly refused to make the withdrawal at the time application thereof was filed. Prior to January 20, 1905, the railway company had made selection of these lands, and its right is superior to that of the State. For the reasons hereinbefore stated, the

judgment of the Commissioner is hereby affirmed.

(Signed.)

A. A. JONES,
First Assistant Secretary.

Counsel having stipulated that the foregoing abstract of the evidence contains all the matter necessary and material for the consideration of any question raised on the appeal herein, and such stipulation being deemed to be correct, it is therefore ordered that the said transcript be and it is hereby settled and allowed as the statement of the evidence.

Dated at Boise, Idaho, this 14th day of November, 1918.

FRANK S. DEITRICH,

Judge.

Endorsed, Filed Nov. 14, 1918.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 660.

STIPULATION.

It is hereby stipulated and agreed by and between counsel for all of the parties hereto, that the foregoing abstract of evidence contains all of the evidence heard on the trial of the above entitled cause which is material for the consideration of any questions raised on the appeal of said cause, and the same may be settled and certified by the Court as an abstract of so much of the evidence that is necessary for the proper consideration of all the questions raised on

the appeal of said cause.

A. H. KENYON,

S. M. STOCKSLAGER,

Counsel for Plaintiff in Error.

STILES W. BURR AND

HORACE H. GLENN,

SKUSE & MORRILL,

Counsel for Defendant, Edward Rutledge Timber Company.

CHAS. W. BUNN,

CANNON & FERRIS,

Counsel for Defendant, Northern Pacific Railway Company.

Endorsed, Filed Nov. 14, 1918.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 660.

DECISION

July 1, 1918.

A. H. Kenyon and S. M. Stockslager, Attorneys for Plaintiff.

Stiles W. Burr, Skuse & Morrill, Attorneys for Edward Rutledge Timber Company, Defendant.

Cannon & Ferris, Attorneys for defendant Northern Pacific Railway Co.

DIETRICH, DISTRICT JUDGE:

The issues are greatly reduced by the decision in *West v. Edward Rutledge Timber Company*, (244

U. S. 90, 221 Fed. 30, 210 Fed. 189), a case arising in the same locality and out of the same general conditions. The relief sought is of the same character in both cases, and the facts are so similar that they need not be stated in full. The land in controversy is the Northeast Quarter of Section 20, Township 43 North, Range 4 East of Boise Meridian. It was patented to the Northern Pacific Railway Company in 1916, and by it conveyed to its co-defendant, the Edward Rutledge Timber Company. Plaintiff contends that in law her ancestor, Beldon M. Delaney, was entitled to patent by virtue of his homestead settlement, and that the defendants hold the title in trust for her. Prior to 1909 the land was unsurveyed. Delaney, having purchased the improvements erected by a preceding occupant, made settlement in 1903, and in 1909, when the land was surveyed, he made application to enter, and later, on November 20, 1912, submitted his final proof. Both the application and the tender of final proof were rejected by the land office.

1. Delaney's acts of settlement and residence are far from satisfactory, and I have great hesitancy in holding them sufficient. True, the showing is not radically different from that in the West case, but in that case the amount cleared and cultivated was thought to be "pathetically small," and, however broad our sympathy for the settler, a line must be drawn somewhere. I am not at all sure that the land officials would have found the showing sufficient had they considered the final proof, but

inasmuch as their rejection was upon other grounds, I shall, in the further consideration of the case, assume that the residence and improvements met the requirements, under the liberal policy prevailing in the Land Department, and that the final proofs would have been accepted but for other conditions upon which the land officials acted.

2. The description in the railroad company's selection list was in terms of future survey, as in the West case, and while the distance to the surveyed lands is a little greater, the difference is not such as to warrant a holding that as a matter of law the description was insufficient to designate the land "with a reasonable degree of certainty." Within reasonable limits, it is a question of fact in any case whether such a description is sufficiently certain, and a finding thereon by the Land Department within such limits will not be disturbed by the courts.

3. The remaining point, argued with great earnestness by both sides, was in no wise involved in the West case, and requires a brief statement of fact. The defendant Railway Company filed its selection lists, under the exchange provision of the act of March 2, 1899, (30 Stat. 993), on July 23, 1901, about a year before settlement by any person. A few days prior to such selection, however, the State of Idaho had made application for the survey of a large body of land, including that in controversy, under the provisions of the Act of August 18, 1894, (28 Stat. 373, 394), and the question is, whether

the proceedings taken by the State prior to July 23rd operated so far to withdraw the land from the public domain that it could not be selected by the Railroad Company either absolutely or conditionally. By the Land Department the question was answered in the negative, first, because there was no valid, effective application for survey before the Railroad Company filed its selection list, and, second, because by the settled construction of the Department, lands, even though embraced in a valid application for survey by the State, may be selected by a railroad company subject to the state's preference right. Such preference right the State has here failed to assert, and no claim upon its part is presently involved.

Under the act of 1894 it is provided that (a) the application for survey must be made by the governor of the state to the "Commissioner of the General Land Office," (b) notice of the withdrawal or reservation of the land is to be immediately given by the Commissioner to the Surveyor General of the State, and to the district Land Office, and, (c), within thirty days from the filing of the application the Governor of the State must give notice of the application by publication for thirty days in a local newspaper. The lands so to be surveyed "shall be reserved, upon the filing of the application for survey, from any adverse appropriation, by settlement or otherwise, except under rights that may be found to exist of prior inception for a period to extend from such application for survey until the expiration of

sixty days from the date of filing the township plat" in the proper district Land Office.

On July 8, 1901, the Governor of Idaho filed with the Surveyor General an application bearing date July 5th, for the survey of eighteen townships, including Township 43 North, Range 4 East, and by the Surveyor General the application was sent to the Commissioner of the General Land Office, by whom it was received July 15th. It is clear, I think, that the application did not become effective for any purpose until it reached the General Land Office, and such is the holding of the Land Department. A notice bearing date July 6th was published in six weekly issues of a local paper, the first publication being on July 10th, and the last on August 14th. Assuming that the first effective publication was that of July 17th, two days after the receipt of the application by the Commissioner, I am inclined to the view that sufficient notice was given to meet the requirements of the law; the publication was made in every issue of the paper published during the thirty-day period following the filing of the application.

As already stated, the application was for the survey of eighteen townships, or approximately 403,000 acres, and other applications of a similar character were pending. Taking cognizance of the vast area thus applied for, and of the limited right of selection remaining in the State, the Commissioner, on July 19, 1901, considered the application in question to be excessive, and declined to recognize it. No appeal having been taken by the State from his ruling,

the same became final and binding, provided, of course, that the Commissioner was acting within his jurisdiction. The application having been declined, no notice of its filing was given to the district Land Office, and no notation was ever made upon the township plats in that office or upon any of its records, of the reservation or withdrawal of the land. Such was the status of the application and of the Land Office records, when, upon July 23rd, the Railroad Company filed its selection lists. Later, in January, 1905, it seems that as a result of certain supplementary proceedings, the General Land Office recognized the preference right of the State, but only from January 18, 1905, not from July 15th, 1901, as appears from a letter of date January 20, 1905, from the Commissioner to the Register and Receiver of the district Land Office, by which the latter officers were directed to give notice of the reservation of certain townships, including 43-4, "from and after * * * January 18, 1905, and for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plats of survey of the designated townships in your office * * * during which time the state authorities may select any of the lands situated in said township, which are not embraced in any adverse claim."

Upon the question of the power of the Commissioner to reject an application for survey, the act of 1894 is equivocal, and the rulings of the Land Department have not been entirely uniform, the later decisions, however, being in support of such juris-

diction. *N. P. R. R. Co. v. Idaho*, 39 L. D. 583. *Thorpe v. Idaho*, 43 L. D. 168. *State vs. Roberson*, 44 L. D. 448.

(Also the decision herein involved.)

The language of the act, it is thought, is more readily susceptible to the construction adopted in the first decision, but in practical administration such a meaning gives rise to the most serious difficulties. In that view, a state with an unsatisfied grant of a thousand acres could by the very simple and inexpensive process of filing an application in the General Land Office and publishing a notice for thirty days, withdraw from entry the entire area of public land, however great, within the state. Is it possible that Congress contemplated or intended such a result? By the terms of the act, the application for survey must be made only "with a view to satisfying the public land grants * * * to the extent of the full quantity of land called for" by the granting acts. Is not the right, therefore, to be regarded as commensurate with the needs of the state? I am not suggesting that the amount applied for cannot in any case properly exceed the unsatisfied grant. The application must be for an entire township, whereas a smaller amount might be sufficient to satisfy the grant. But giving consideration to the extent of the grant and the character of the lands, and the interest of the Government in having its public lands disposed of and not needlessly withdrawn from entry, it is thought that the area to be surveyed must bear some reasonable relation to the area the state

has the right to select. Such being the extent of the right or privilege conferred upon the state, it follows that an application for an excessive survey, being unauthorized, is ineffective, and it is for the officers of the Land Department, charged, as they are, with the sale and disposition of public lands, to determine whether in any given case the application is within the law. In any other view I am unable to see how the interest of the Government can be protected. If therefore in fact the application under consideration was found to be excessive, the Commissioner of the General Land Office did not exceed his jurisdiction in declining to recognize it, and in refusing to take any steps to carry it into effect.

It is further contended by the plaintiff that, defective though it may have been, the application served to withdraw the land from the operation of the act of 1899, reference being had to the familiar principle that the segregative effect of an entry or other selection is not necessarily dependent upon its inherent validity. *Holt v. Murphy*, 207 U. S. 407. *McMichael v. Murphy*, 197 U. S. 304. *Hodges v. Colcord*, 193 U. S. 192. *Sturr v. Beck*, 133 U. S. 541. *Edith G. Halley*, 40 L. D. 393. If, however, as is held, the Commissioner of the General Land Office had the power to reject it, the application never became operative for any purpose. To have segregative effect, an invalid application or entry must in some way be accepted or recognized by the Land Department; having been allowed, even though erroneously, it is binding upon and segregates the land. But

here at the very outset there was a declination to recognize the application. If, however, we assume that the application was valid, and that the Commissioner was without power to reject it, it must be borne in mind that it constituted no offer to enter the land, but amounted only to a request to have it surveyed. The land was not entered or selected; the State made no specific claim, and it might ultimately decide not to select a single subdivision. True, the terms "reserved" and "withdrawn" are used in the act, but when we consider its intent and purpose, clearly the only effect contemplated was to confer upon the State a preference right to select, at its option. By the filing of the application the State initiated no claim or right to any portion of the land. As has been very properly held by the Land Department, I think, the position of the State is closely analogous to that of a successful contestant after the cancellation of record of the contested entry. The land embraced in such entry is, as a result of the cancellation, fully restored to the public domain, and is no longer segregated or reserved, but the contestant possesses the preference right of entry. Accordingly, following the practice in relation to such contested entries, the Department holds that the pendency of such preference right does not operate to prevent the filing of other applications, subject to such preference right. *Stewart v. Peterson*, 28 L. D. 515. *Cronan v. West*, 34 L. D. 301. *State v. N. P. R. R. Co.*, 37 L. D. 70. *Swanson v. N. P. R. R. Co.*, 37 L. D. 74. *Delaney v. N. P. R. R. Co.*, (unreport-

ed, decision Nov. 18, 1915). No good reason is apparent for holding such a practice illegal. Our attention is directed to the language of the act of March 2, 1899, creating and defining the limits of the right of the railroad company to select, wherein it is authorized "to select, in exchange for lands relinquished by it, an equal quantity of non-mineral public lands * * * not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection," etc. But this language does not alter the question. Neither can a citizen rightfully settle upon or enter land unless it be public land, not reserved, and to which no private rights have attached or been initiated, etc. And yet the plaintiff asserts the right of her predecessor to settle upon and claim the land in controversy long after the state filed its application, and after the railroad company filed its selection. The right of the railroad company to select is quite as broad as the right of the citizen to "homestead". As already suggested, by its application for survey the state initiated no claim to this land; it was merely given a certain length of time to determine whether it would make such claim, and while the term "reserved" is used, plainly there is no reservation in the ordinary sense, as for some governmental purpose. The moment the preferential period in favor of the state expires, the lands may be entered by any qualified person, the same as in the case of other public lands.

In view of these considerations, it is thought that

the Land Department acted upon a proper construction of the law and accordingly the plaintiff's bill will have to be dismissed, and such will be the order.
Endorsed, Filed July 1, 1918,

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

DECREE.

The above entitled cause having come on to be heard, the complainant appearing by her solicitor, A. H. Kenyon, and defendants appearing by their solicitors, Stiles W. Burr, John J. Skuse, Fred B. Morrill and Edward J. Cannon, and having been submitted to the court upon the pleadings herein, and upon proof taken in open court, and said cause having been argued by counsel, and the court being advised, it is on motion of counsel for defendants,

ORDERED, ADJUDGED AND DECREED,

That bill of complaint of the complainant herein, be, and it is hereby dismissed for want of equity, and; it is further,

ORDERED, ADJUDGED AND DECREED,

That defendants have and recover their costs and disbursements herein.

Dated this 20th day of September, 1918.

BY THE COURT,

FRANK. S. DIETRICH,

Judge.

O. K. as to form.

A. H. Kenyon,

Solicitor for plaintiff.

Endorsed, Filed Sept. 20, 1918,

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

PETITION FOR APPEAL AND ORDER
ALLOWING SAME.

The above named plaintiff, Alra G. Farrell, conceiving herself aggrieved by the judgment entered on the 20th day of September, 1918, in the above entitled cause, doth hereby appeal from said judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, and she prays that this, her appeal, may be allowed; that a transcript of the record, proceedings and papers upon which said judgment was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

A. H. KENYON,

S. M. STOCKSLAGER,

Attorneys for Plaintiff.

Old National Bank Bldg.,

Spokane, Washington.

And now, to-wit, on the 14th day of November, 1918, IT IS ORDERED, that the appeal be allowed as prayed for and that the amount of bond on said

appeal be, and it hereby is, fixed at Two Hundred Dollars.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed Nov. 14, 1918,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

ASSIGNMENTS OF ERRORS.

Comes now the above named plaintiff, Alra G. Farrell, and in connection with her appeal makes the following assignments of error which she avers were committed by the Court in the trial of this cause, and upon which she will rely in the prosecution of her appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Ninth Circuit:

I.

The Court erred in finding and deciding that the description in the Railroad Company's lieu selection list in terms of future survey were sufficient to designate the lands with a "reasonable degree of certainty", as required by the act of March 2nd, 1899, when applied to the facts established on the trial of this cause, and in applying the rule in the West case to the case at bar: (Andrew West, vs. N. P. Ry. Co. et al)

And also in finding and deciding that under the facts shown the question of whether or not the land

was described with a "reasonable degree of certainty", was a question of fact only.

II.

The Court erred in finding, holding and deciding that the State of Idaho did not initiate any claim or right to the lands in controversy by the filing of its application for survey under the Act of August 18th, 1894; and in holding and deciding that the Railway Company could make a valid selection of the lands in controversy while the application of the State of Idaho to select was still pending, which right of the Railway Company was "subject to the right of the State to select."

III.

The Court erred in finding, holding and deciding that Beldon M. Delany, the deceased entryman, as the successful contestant did not have a preference right of entry of the lands in controversy under the homestead laws of the United States as against the defendant Railway Company, by reason of being the successful contestant over the State of Idaho, in the contest for same before the Land Office; and in holding and deciding that such preference right of entry on the part of Delany did not operate to prevent the filing of the Railway Company's selection list so as to prevent the Railway Company from acquiring a right to select subject to such preference right on the part of Delany.

IV.

The Court erred in rendering judgment in favor of the defendants, and against the plaintiff.

WHEREFORE, plaintiff prays that the aforesaid errors be corrected and the judgment of the District Court reversed, and that said Court be directed to set aside the judgment heretofore rendered in favor of the defendants and render judgment in favor of the plaintiff, to the effect that the defendants hold the title to the real estate described in plaintiff's complaint herein in trust for the plaintiff, and that plaintiff's title thereto be forever quieted as against the said defendants and each of them, or, if it be deemed that such relief is not grantable, that the cause be remanded for new trial.

A. H. KENYON,
S. M. STOCKSLAGER,
Attorneys for Plaintiff.

Endorsed, Filed Nov. 14, 1918,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

PRAECIPE

An appeal having been prosecuted by the plaintiff above named from the final decree entered herein, dismissing the bill of complaint of the plaintiff.

IT IS NOW STIPULATED, by and between the parties hereto by their respective solicitors, that the following papers shall, together with the petition for appeal, order allowing appeal, bond on appeal, citation on appeal, be incorporated into and constitute the record on such appeal:

1. Copy of amended Bill of Complaint.
2. Ccypy of Answer of defendant, Northern Pacific Railway Company to amended bill of complaint.
3. Copy of Answer of defendant, Edward Rutledge Timber Company, to amended bill of complaint.
4. The abstract of the evidence.
5. A copy of final decree.
6. A copy of the opinion of the trial court.

It is further stipulated that such transcript, including the foregoing papers, may be approved by the Judge of said Court for the purposes of the appeal herein.

A. H. KENYON,
S. M. STOCKSLAGER,
Counsel for Plaintiff.

STILES W. BURR and
HORACE H. GLENN,
SKIUSE & MORRILL,
Counsel for Defendant,
Northern Pacific Rail-
way Co.

CHAS. W. BUNN,
CANNON & FERRIS,
Counsel for Defendant,
Edward Rutledge Tim-
ber Co.

Endorsed, Filed Nov. 14, 1918,
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 660.

CITATION ON APPEAL

UNITED STATES OF AMERICA,—ss.

To Edward Rutledge Timber Company, a corporation, and Northern Pacific Railway Company, a corporation:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within Thirty (30) days from the date hereof pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of Idaho, wherein, Alra G. Farrell (substituted for Beldon M. Delany), is the appellant and Edward Rutledge Timber Company, a corporation, and Northern Pacific Railway Company, a corporation, are appellees, to show cause, if any there be, why the said decree in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties on that behalf.

WITNESS, the Honorable Frank S. Dietrich, Judge of the United States District Court for the District of Idaho, this 23rd day of November, 1918, and of the Independence of the United States the One Hundred and Forty-second.

(SEAL)

FRANK S. DIETRICH,
District Judge.

ATTEST:

W. D. McReynolds, Clerk.

Service of the foregoing Citation on Appeal acknowledged and copy thereof received this 29th day of November, 1918.

STILES W. BURR &
HORACE H. GLENN,
Counsel for Defendant,
Edward Rutledge Tim-
ber Company.

CANNON & FERRIS,
CHARLES DONNELLY,
Counsel for Defendant,
Northern Pacific Rail-
way Company.

RETURN TO RECORD

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

ATTEST:

(SEAL) W. D. McREYNOLDS,
Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 154, inclusive, to be full, true and

correct copies of the pleadings and proceedings in the above entitled matter, and that the same together constitute the transcript upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe for such transcript.

I further certify that the cost of the record herein amounts to the sum of \$216.95, and that the same has been paid by the appellant.

I further certify that I have received from the appellant the sum of \$200.00 cash bond on appeal; which amount is deposited in the registry fund of this Court pending the termination of this appeal.

Witness my hand and the seal of said Court this 21st day of December, 1918.

W. D. McREYNOLDS,

(SEAL)

Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3276.

ALVA G. FARRELL, Substituted for Beldon M. Delany, Appellant,
vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN
PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

Upon Appeal from the United States District Court for the District
of Idaho, Northern Division.

*Proceedings had in the United States Circuit Court of Appeals for
the Ninth Circuit.*

At a Stated Term to wit, the October Term, A. D. 1918, of the United
States Circuit Court of Appeals for the Ninth Circuit Held in the
Court-room Thereof, in the City and County of San Francisco, in
the State of California, on Wednesday, the Fifth Day of March,
in the Year of Our Lord One Thousand, Nine Hundred and
Nineteen.

Present:

Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
Honorable William W. Morrow, Circuit Judge.
Honorable Maurice T. Dooling, District Judge.

No. 3276.

ALVA G. FARRELL, Substituted for Beldon M. Delany, Appellant,
vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN
PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

Order of Submission.

Ordered appeal in the above-entitled cause argued by Mr. A. H.
Kenyon, counsel for the appellant, and by Mr. Stiles W. Burr,
counsel for the appellee, and submitted to the court for consideration
and decision.

At a Stated Term, to wit, the October Term, A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Nineteenth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Nineteen.

Present:

Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William H. Hunt, Circuit Judge.

No. 3276.

ALVA G. FARRELL, Substituted for Beldon M. Delany, Appellant,
vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN
PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

*Order Directing Filing of Opinion and Filing and Recording of
Decree.*

By direction of the Honorable William B. Gilbert and William W. Morrow, Circuit Judges, and the Honorable Maurice T. Dooling, District Judge, before whom the cause was heard, ordered that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk, and that a Decree be filed and recorded in the Minutes of this Court, in accordance with said opinion.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3276.

ALVA G. FARRELL (Substituted for Beldon M. Delany), Appellant,
vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN
PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

(*Opinion U. S. Circuit Court of Appeals.*)

A. H. Kenyon and S. M. Stockslager, for the Appellant.
Stiles W. Burr, Horace H. Glenn, and Skuse & Morrill, for the Appellees.

Before Gilbert and Morrow, Circuit Judges, and Dooling,
District Judge.

Beldon M. Delany brought a suit in the court below to have the Edward Rutledge Timber Company, a corporation, declared a trustee for him of the legal title to a quarter section of land of which he claimed to be the equitable owner by virtue of settlement and subsequent entry and final proof under the homestead laws of the United States. The facts as found by the court below are that on July 5, 1901, the Governor of the State of Idaho applied to the Surveyor General of the state, and to the Commissioner of the General Land Office, under the Act of August 18, 1894, for a survey of a township of unsurveyed lands, including the land in controversy. On July 15, 1901, the application was filed in the office of the Commissioner of the General Land Office. Thereafter the state complied with the requirements of the Act and obtained title to some of the lands covered by its application, but not the lands involved in this suit. On July 23, 1901, under the Act of March 2, 1899, the Northern Pacific Railway Company filed its lieu selection list in the local land office at Cœur d'Alene, Idaho. On or about May 1, 1902, W. B. Leach, a citizen of the requisite age and qualified to make homestead entry, having no knowledge of the application of the state or of the filing of the lieu selection list by the Railway Company, settled upon a portion of the vacant, unoccupied public domain of the United States which was afterwards by the official survey found to be the northeast quarter of Section 20, Township 43 North, Range 4 E. B. M., and he continuously resided and made his home thereon until June 21, 1903, when he sold his claim and improvements to Delany, who was also a citizen and competent to acquire land under the homestead laws. Delany established his home on the land, with the intention of entering the same under the homestead laws of the United States when open for entry, and he improved and cultivated the land and continuously made his home thereon until after the commencement of this suit. On June 4, 1909, the land was surveyed and opened to settlement. On June 10, 1909, Delany made his application to enter the quarter section on which he resided under the homestead laws, and on November 20, 1912, he offered final proof. His homestead entry was rejected on the ground that it was in conflict with selection by the State of Idaho. From that decision he appealed to the Commissioner of the General Land Office, and on December 16, 1909, the Commissioner sustained the decision of the local land office, and ruled that the right of the state was prior, and that Delany's application was properly rejected on that ground. On June 28, 1915, the claims of the State of Idaho were cancelled, and on July 9, 1915, Delany's homestead application was held for rejection on the ground that it was in conflict with the selections of the Railway Company. Delany appealed to the Secretary of the Interior and on November 18, 1915, the Secretary affirmed the decision of the General Land Office on the ground that the Railway Company had the right to make a valid ap-

plication for the land notwithstanding the claim of the State of Idaho. Patent was issued to the Railway Company, and the land was thereafter conveyed to Edward Rutledge Timber Company. It was shown that when Leach made his settlement on the land he blazed a line around his claim to locate his boundaries, and posted notices on each corner, and that when he sold out to Delany, the latter took down Leach's notices and posted notices of his own. Delany did not know that an attempt had been made to appropriate the land, either by the state or by the Railway Company, and there was nothing on the land or in the local land office to indicate that any such claim was made except the lieu selection list which was on file and the application of the state, which was a matter of record in the General Land Office. On June 21, 1903, when Delany purchased the rights of Leach and made settlement on the land the nearest surveyed line to the said land was the east line of Township 43, Range 2, E. B. M. 7½ miles distant from the nearest part of said land. The land between those two lines was very rough and mountainous and the most of it covered with heavy timber. Section 4 of the Act of March 2, 1899 providing for lieu land selections declares "In case the tract so selected shall at the time of selection be unsurveyed the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed in said local land office, a new selection list shall be filed by said company describing such tract according to such survey; that in case such tract as originally selected and described in the list filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity." In the list which was filed the Railway Company described the land as follows: "The following tract which when surveyed will be described as follows: All of 20—43—4, containing 640 acres."

GILBERT, *Circuit Judge*, after stating the case:

The appellant contends that the land was not described in the railway company's list so as to designate the same with a reasonable degree of certainty. The appellees contend (1) that the lands were designated with a reasonable degree of certainty, and (2) that the acceptance of the list and the issuance of patent by the Land Office involved the finding of fact that the lands were designated with a reasonable degree of certainty, and that such a finding of fact is conclusive.

We find in this case no decision of fact that the description of the land as listed by the Railway Company designated the same with a reasonable degree of certainty. The record shows on the contrary that no decision was made on the facts of the case, and that the action of the Land Office was but the application of the settled rule of practice which it followed in all cases, that all unsurveyed lands

listed by a railway company as lieu lands were designated with a reasonable degree of certainty if they are designated by the description applicable to them after they shall have been surveyed. Thus on the appeal the decision of the Secretary of the Interior states not that the rejection of Delany's application was supported by the facts, but that it was supported by the reasons given by the Department in its decision in *Daniels v. Northern Pac. Ry. Co.*, 43 L. D. 381. Turning to that decision we find it stating that all lists filed for lieu lands by railway companies were accepted under general regulations of the Department in every case where the lands were described in the terms of future survey, and the decision points to the Act of Congress of July 1, 1898, which provided that lands under that Act be selected in terms of a future survey, as sanctioning the propriety of the settled practice of the Land Department. Conceding that the act of 1898 had the meaning attributed to it, it is to be observed that a year later in enacting the statute under which the lieu lands were selected in the present case, Congress adopted a different provision and required not that the lands be described in terms of future survey, but that they be designated with a reasonable degree of certainty, which, as we take it, means that Congress was not satisfied that the prior statute and prior practice were adequate in every case for the description of listed lands, but that other means of identification might become necessary in view of possible facts which would render the description in terms of future survey inadequate. In the present case it is clear that the particular circumstances attending this lieu land selection were not taken into consideration by the Land Department. They did not decide that the description was reasonably sufficient, as applied to this particular tract of land. They applied only a rule of practice and in so doing decided a question of law and not a question of fact.

A similar case was before us, *West v. Edward Rutledge Timber Co.*, 221 Fed. 30, in which we sustained the court below in ruling that the Railway company's designation of a list of unsurveyed land by the description by which it would be known when surveyed was legally sufficient where the tract was within three miles of a surveyed township and could be located with approximate certainty. In that case we said: "It may be conceded, in so far as it respects this case, that a description of a section or a quarter section by legal subdivisions in the fastnesses of the Cascades or Rocky Mountain ranges, far distant from any government survey, or even generally that a description in terms of future survey, is not such a description as is contemplated by the statute. What may be a sufficient description for designating the tract under one set of circumstances might be wholly insufficient under another." Our decision was affirmed in *West v. Rutledge Timber Co.*, 244 U. S., 90. In that case the court said: "What was a description having a reasonable degree of certainty was to be determined by the circumstances. It was in the nature of a question of fact, and had tests for decision, as the Court of Appeals pointed out." This means that the question is in the nature of a question of fact when it is determinable accord-

ing to the proper tests applicable to facts. It does not mean that the adoption and application of a general rule of practice by the Land Office is a decision of a question of fact.

We are of the opinion that to designate the section of land in which the section in controversy is situated in terms of a future survey was wholly insufficient to designate the same with a reasonable degree of certainty. In the West case, this court said: "But the further the remove from an established survey, it stands to reason, the greater will be the difficulty of setting foot on the identical tract, until eventually no reasonable being could expect another to tie back to a known surety for the purpose of identification." With the uncertainty there foreshadowed we are here brought face to face. The homestead settler here could not, without the expenditure of a large sum of money, ascertain in what section his land would be when finally surveyed. The land was $7\frac{1}{2}$ miles from a known survey and the intervening space was a rough, mountainous, timbered country. Even if he had gone to the expense of a survey, he could not know that the government survey would coincide with his. By the Act of May 14, 1880, 21 Stat. 141, he was given the right to make his homestead upon unsurveyed lands. He duly marked the boundaries of his claim, and made his residence thereon. He selected a parcel of land in an unsurveyed township, with nothing on the ground or on record in the plats of the local land office to notify him that the tract had been selected by the railway company. Said the court in *Lytle v. State of Arkansas*, 9 How. 314, 333: "The adventurous pioneer who is found in advance of our settlements, encounters many hardships and not infrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres. That this is the national feeling is shown by the course of legislation for many years." And in *Ard v. Brandon*, 156 U. S., 537, 543, the court said: "The law deals tenderly with one who in good faith goes upon the public lands with a view of making a home thereon."

The view which we have taken of this branch of the case renders it unnecessary to consider the other assignments of error. The decree is reversed and the cause is remanded to the court below with instructions to enter a decree for the appellant as prayed for in the bill.

[Endorsed:] Opinion. Filed May 19, 1919. F. D. Monkton,
Clerk, Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3276.

ALVA G. FARRELL, Substituted for Belden M. Delany, Appellant,
vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN
PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

Decree.

(Decree U. S. Circuit Court of Appeals.)

Appeal from the District Court of the United States for the District
of Idaho, Northern Division.

This Cause came on to be heard on the Transcript of the Record
from the District Court of the United States for the District of Idaho,
Northern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and
decreed by this Court, that the decree of the said District Court in
this cause be, and hereby is, reversed with costs in favor of the
appellant and against the appellees and that this cause be, and is
hereby remanded to the said District Court with instructions to
enter a decree for the appellant as prayed for in the bill.

It is further ordered, adjudged and decreed by this Court, that
the appellant recover against the appellees for his costs herein ex-
pended, and have execution therefor.

[Endorsed:] Decree. Filed and entered May 19, 1919. F. D.
Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3276.

ALVA G. FARRELL (Substituted for Belden M. Delany), Appellant,
vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN
PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

Petition for and Order Allowing Appeal to Supreme Court U. S.

The above named appellees Edward Rutledge Timber Company
and Northern Pacific Railway Company, respectfully show that the
above entitled cause is now pending in the United States Circuit

Court of Appeals for the Ninth Circuit; that a decree was therein rendered on the 19th day of May, 1919, reversing the decree of the District Court of the United States for the District of Idaho, Northern Division, and remanding the cause to said District Court with instructions to enter a decree for the above named appellant as prayed for in the bill of complaint in said cause; that the amount involved in said suit and the matter in controversy therein and on this appeal exceeds One thousand dollars (\$1,000) besides costs, and in fact exceeds Five thousand dollars (\$5,000), exclusive of interest and costs; that this cause is not one in which the United States Circuit Court of Appeals for the Ninth Circuit has final jurisdiction; and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, said Edward Rutledge Timber Company and Northern Pacific Railway Company pray that an appeal be allowed them in the above entitled cause, and that the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit be directed to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed may be reviewed, and, if error be found, be corrected according to the laws and customs of the United States; and desiring to supersede the execution of the decree, petitioners hereby tender bond in such amount as the Court may require for such purpose, and pray that with the allowance of the appeal a supersedeas be issued.

C. W. BUNN,

STILES W. BURR,

*Solicitors for Edward Rutledge Timber Company
and Northern Pacific Railway Company.*

STATE OF MINNESOTA,
County of Ramsey, ss:

Stiles W. Burr came before me personally, and being duly sworn, deposes and says: That he is one of the solicitors for the above named appellees Edward Rutledge Timber Company and Northern Pacific Railway Company; that he has read the foregoing petition by him subscribed, and knows the contents thereof; and that said petition and all the statements therein contained are true to the best of his knowledge, information and belief.

STILES W. BURR.

Subscribed and sworn to before me this 10th day of July, 1919.
HORACE H. GLENN,

[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

My commission expires February 23, 1922.

Order Allowing Appeal.

And now, to wit, on the 15th day of July, 1919, being a day of the same term of court in which the above mentioned decree was rendered and entered, it is ordered that the above appeal be allowed as prayed.

W. H. HUNT,
*Judge of the United States Circuit Court
of Appeals for the Ninth Circuit.*

[Endorsed:] Petition for and Order Allowing Appeal to Supreme Court U. S. Filed July 15, 1919, F. D. Mockton, Clerk, By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3276.

ALVA G. FARRELL (Substituted for Belden M. Delany), Appellant,
vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

Assignment of Errors on Appeal to Supreme Court U. S.

Now come the above named appellees Edward Rutledge Timber Company and Northern Pacific Railway Company, and say that in the decree in the above entitled cause made and entered on the 19th day of May, 1919, there is manifest error, and they file the following assignment of errors committed and happening in the said cause upon which they will rely in their appeal from such decree:

1. The Court erred in holding that W. B. Leach, the first alleged settler on the land in controversy, had no knowledge at the time of his alleged settlement upon the land of the filing by the Northern Pacific Railway Company of the lieu selection list referred to in the Court's opinion.
2. The Court erred in holding that Belden M. Delany who afterwards settled on said land, did not know at the time of his settlement thereon of the filing of said selection list by said Northern Pacific Railway Company, and did not know that an attempt had been made to appropriate the land, either by the State or Idaho or by the Northern Pacific Railway Company.
3. The Court erred in holding that said Delany continuously made his home on the land in controversy after his settlement thereon, and that he improved and cultivated said land and resided thereon to an

extent sufficient to constitute compliance with the conditions of the homestead law.

4. The Court erred in holding that by his letter to said Delany dated December 16, 1909, the Commissioner of the General Land Office sustained the decision of the local land officers rejecting said Delany's application on the ground that the State of Idaho had acquired a prior right to the land and ruled that said application was properly rejected on that ground.

5. The Court erred in holding that the Secretary of the Interior and the officials of the Department of the Interior did not determine and decide as a question of fact, that the description of the land in controversy contained in the said selection list of said Northern Pacific Railway Company designated the land selected with a reasonable degree of certainty, and in holding that the decisions of the Secretary of the Interior rejecting said Delany's application do not state or show that such rejection was supported by the facts.

6. The Court erred in holding that the Secretary of the Interior and the officials of the Interior Department, in passing on the case, did not take into consideration the particular circumstances attending the selection of said land by the Northern Pacific Railway Company, and in holding that said Secretary of the Interior and said Department officials did not decide that the description of said land in its selection list was reasonably sufficient, as applied to the particular tract of land involved in this suit.

7. The Court erred in holding that the description of the land selected by the Northern Pacific Railway Company contained in its said selection list (including the land in controversy in this suit), was not sufficient to designate said land with a reasonable degree of certainty, within the intent and meaning of the act of March 2, 1899.

8. The Court erred in holding that the Northern Pacific Railway Company did not acquire full and complete title, legal and equitable, to the land in controversy, under the patent of the United States issued to it.

9. The Court erred in reversing the decree of the District Court dismissing the bill of complaint herein, and in making and entering a decree in favor of the appellant Farrell.

Wherefore, the above named Edward Rutledge Timber Company and Northern Pacific Railway Company, conceiving themselves aggrieved by said decree, made and entered as aforesaid, pray that said decree be reversed and that a decree be entered affirming the decree of the District Court and dismissing the bill of complaint.

C. W. BUNN,
STILES W. BURR,

*Solicitors for Edward Rutledge Timber Company
and Northern Pacific Railway Company.*

[Endorsed:] Assignment of Errors on Appeal to Supreme Court
U. S. Filed July 15, 1919. F. D. Monckton, Clerk, By Paul P.
O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3276.

ALVA G. FARRELL (Substituted for Belden M. Delany), Appellant,
vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN
PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

*Affidavit of Rudolph M. Weyerhaeuser, of Value of Matter in
Controversy.*

STATE OF MINNESOTA,
County of Ramsey, ss:

Rudolph M. Weyerhaeuser, to me well known, came before me personally, and being first duly sworn, deposes and says:

That he is and for some years past has been the President of the above named Edward Rutledge Timber Company; that he is acquainted with the land in controversy in the above entitled cause, to wit: The Northeast quarter (NE $\frac{1}{4}$) of Section twenty (20) in Township forty-three (43) North, of Range four (4) East of Boise Meridian, in the State of Idaho; that said land is covered by a heavy stand of valuable timber; that said land was at and before the time of the commencement of the above entitled suit in the year 1916, and ever since has been and now is reasonably worth and of the value of more than Five thousand dollars (\$5,000); and that the entire title to said land, and the whole value thereof, is involved in and affected by the decree made and entered herein on the 19th day of May, 1919, and is in controversy in said suit, and on the appeal about to be prosecuted by said Edward Rutledge Timber Company and Northern Pacific Railway Company to the Supreme Court of the United States for reversal of said decree.

RUDOLPH M. WEYERHAEUSER.

Subscribed and sworn to before me this 10th day of July, 1919.
[NOTARIAL SEAL.] HORACE H. GLENN,
Notary Public, Ramsey County, Minnesota.

My commission expires February 23, 1922.

[Endorsed:] Affidavit of Rudolph M. Weyerhaeuser of Value of Matter in Controversy. Filed July 15, 1919. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3276.

ALVA G. FARRELL (Substituted for Belden M. Delany), Appellant,
vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN
PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

Bond on Appeal to Supreme Court U. S.

Know all men by these presents: That we, Edward Rutledge Timber Company, a corporation, and Northern Pacific Railway Company, a corporation, as principles, and National Surety Company of New York, a corporation, as surety, are held and firmly bound unto Alva G. Farrell, in the sum of One thousand dollars (\$1000) to be paid to said Alva G. Farrell, for the payment of which well and truly to be made we bind ourselves, and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 11th day of July, 1919.

Whereas the above named Edward Rutledge Timber Company and Northern Pacific Railway Company have prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered and entered in the above entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit on the 19th day of May, 1919, in a suit pending in said court wherein said Alva G. Farrell is appellant and said Edward Rutledge Timber Company and Northern Pacific Railway Company are appellees.

Now, therefore, The condition of this obligation is such that if the above named Edward Rutledge Timber Company and Northern Pacific Railway Company shall prosecute their said appeal to effect, and answer all damages and costs, if they fail to make their plea good, then this obligation shall be void; otherwise the same shall remain and be of full force and virtue.

EDWARD RUTLEDGE TIMBER COMPANY,

By STILES W. BURR,

Its Solicitor.

NORTHERN PACIFIC RAILWAY COMPANY,

By C. W. BUNN,

Its Solicitor.

NATIONAL SURETY COMPANY OF NEW YORK,

By L. A. GREEN,

Its Attorney in Fact.

[CORPORATE SEAL.]

Executed in presence of:

HORACE H. GLENN,
ANN B. GRACE,

As to E. R. T. Co.

HORACE H. GLENN,
ANN B. GRACE,

As to N. P. R. Co.

G. C. JOHNSON,
L. JASPER,

As to N. S. Co.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 11th day of July, 1919, before me personally appeared L. A. Green, attorney in fact of the National Surety Company of New York, with whom I am personally acquainted, and who, being by me duly sworn, said that he is the attorney in fact of said corporation National Surety Company of New York; that he knows the corporate seal of said corporation; that said corporate seal was affixed to the foregoing instrument by order of the Board of Directors of said corporation; and that he signed the said instrument as attorney in fact of said corporation by authority of said Board of Directors; and said L. A. Green acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.]

G. C. JOHNSON,
Notary Public, Ramsey County, Minnesota.

My commission expires Sept. 20, 1924.

The foregoing bond is approved this 15th day of July, 1919, as a supersedeas of the decree herein.

W. H. HUNT,
*Judge of the United States Circuit Court
of Appeals for the Ninth Circuit.*

[Endorsed:] Bond on Appeal to Supreme Court U. S. Filed July 15, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3276.

ALVA G. FARRELL, Substituted for Beldon M. Delany, Appellant,
vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN
PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

*Præcipe for Certified Transcript of Record on Appeal to the Supreme
Court of the United States.*

To the Clerk of the said Court.

SIR:

Please make and furnish me with a certified transcript of the record (including the proceedings had in said Circuit Court of Appeals), for use on appeal to the Supreme Court of the United States in the above entitled cause, the said transcript to consist of a copy of the following:

(1) Printed Transcript of Record on which the cause was heard in said Circuit Court of Appeals, to which will be added a typewritten copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz:

(2) Memorandum of Errors in Printed Record, and Index to Printed Record (attached to and filed with this Præcipe);

(3) Order of Submission, entered Mar. 5, 1919;

(4) Order Directing Filing of Opinion, etc., entered May 19, 1919;

(5) Opinion, filed May 19, 1919;

(6) Decree, filed and entered May 19, 1919;

(7) Petition for and Order Allowing Appeal and fixing amount of bond;

(8) Affidavit of R. M. Weyerhaeuser dated July 10, 1919, and filed July 15, 1919;

(9) Assignment of Errors;

(10) Bond on Appeal;

(11) Præcipe for Transcript of Record;

(12) Certificate of Clerk, U. S. Circuit Court of Appeals to said Transcript;

(13) Citation on Appeal.

C. W. BUNN AND
STILES W. BURR,
Counsel for the Appellees.

Service of a copy of the within pinciple is admitted this 22nd day of August, A. D. 1919.

S. M. STOCKSLAGER,
Counsel for the Appellant.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3276.

ALVA G. FARRELL, Substituted for Beldon M. Delany, Appellant,
vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN
PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

*Memorandum of Errors in the Printed Record and Index to
Printed Record.*

Page 16, paragraph XVI, fourth line: The next to the last word in the line should be "of".

Page 24, first line: The fourth word should be "face".

Page 26, paragraph 10, fourth line: The fifth word should be "application".

Page 27, sixth line: Insert before the word "state" the following—"said Governor, or any other person, or by or on behalf of the".

Page 27, last line: The second word in the line should be "constitute".

Page 30, fifth line: The numeral should be "4" instead of "5".

Page 35, seventh line: The year should be "1901".

Page 35, paragraph 21, first line: The last word in the line should be "or".

Page 37, second line: Strike out the words "the defendant Railway Company" (repetition).

Page 56, thirteenth line: Insert the words "this defendant" before the word "became".

Page 56, paragraph 23: Strike out the second line of the paragraph and insert the following: "lany the party instituting this suit & plaintiff died".

Page 67, eighth line from bottom: The township number should be "45" instead of "34".

Page 73, second line: The second word in the line should be "plats".

Page 73, seventh line: The second word in the line should be "or".
 Page 91, ninth line: The month should be "July" instead of "January".

Page 106, at the end of affidavit, and before the words "Subscribed and sworn to, etc." insert the words "Wm. H. Phipps (signed)".

Various documents making up the plaintiff's exhibits are insufficiently separated in the printing. If a separating line be drawn in the places indicated as follows, the documents will be more intelligible:

Page 86, between lines 18 and 19.

Page 107, immediately below the words "Approved Sept. 25, 1901," near the bottom of the page, and just above the date "June 4, 1909".

Page 112, between the 8th and the 9th lines (just above the heading "Department of the Interior").

Page 113, between the 7th and the 8th lines (just above the heading "Department of the Interior").

Page 115, just above the heading "Department of the Interior" near the bottom of the page.

Page 117, between the 11th and 12th lines (just above the heading "Department of the Interior").

Page 117, immediately above the 6th line from the bottom of the page.

Page 119, between the 15th and 16th lines.

Page 121, between the 8th and 9th lines.

Page 122, between the 6th and 7th lines.

Page 125, immediately before the last line on the page.

Page 135, between the 4th and 5th lines.

Index to Exhibits in Printed Record.

(Note: The index appearing in the printed record does not sufficiently describe the exhibits, some of which consisted of numerous papers and documents from the files of the Commissioner of the General Land Office. The following index to exhibits is therefore submitted, for the convenience of the Court.)

Plaintiff's Exhibit 2-A.....	79-97
Application for Survey made by F. W. Hunt, Governor of Idaho, July 5, 1901.....	79
Letter, U. S. Surveyor Gen'l to Commissioner Gen'l Land Office, July 10, 1901, transmitting State's application for survey.....	80
Letter, Commissioner to Surveyor Gen'l, July 19, 1901.....	82
Letter, Commissioner to Surveyor Gen'l, Feb. 12, 1902.....	83
Letter, Commissioner to Gov. Hunt, Feb. 10, 1902.....	84
Notice by Register of State Indemnity Selection July 30, 1909.....	85
Decision of Commissioner July 16, 1914, holding State selections for cancellation.....	86-97

Plaintiff's Exhibit 2-B; Commissioner's "Clear List", Oct. 1, 1915, approved by Secretary.....	97-192
Plaintiff's Exhibit 2-C.....	102-115
Northern Pacific Selection List No. 71, filed July 23, 1901.....	102-107
Northern Pacific Redescriptive List, filed June 4, 1909.....	107-112
Letter, Director U. S. Geological Survey to Commissioner, May 13, 1915.....	112-113
Letter, Commissioner to Register and Receiver, promulgating departmental decision cancelling State selections, June 28, 1915.....	113-115
Plaintiff's Exhibit 2-D.....	115-127
Letter, Register to B. M. Delany, Aug. 31, 1909, giving notice of cancellation of homestead entry.....	115
Letter, Commissioner to Delany, Dec. 15, 1909.....	115-117
Decision of Commissioner cancelling homestead entry July 9, 1915.....	117-119
Decision of Secretary on appeal, holding homestead application for rejection, Nov. 18, 1915.....	119-121
Decision of Secretary, Jan. 29, 1916, denying motion for rehearing of his decision of Nov. 18, 1915.....	121-122
Letter, Commissioner to Register and Receiver, Feb. 11, 1916, promulgating Secretary's final decision of Jan. 29, 1916.....	122
Decision of Secretary, March 11, 1916, denying petition of homestead entryman Delany for exercise of supervisory power.....	123-125
Abstract of a portion of Exhibit 2-D, showing filing of plat of survey and proceedings in local land office and General Land Office and before Secretary on Delany's homestead application.....	125-127
Defendants' Exhibit No. 1; Patent to Northern Pacific Railway Company.....	127-130
Defendants' Exhibit No. 2; Notice of preference right under State's application for survey, dated January 20, 1905, from Commissioner to Register and Receiver.....	130-132
Defendants' Exhibit No. 3; Decision of Secretary Oct. 30, 1914, in case of George A. McDonald v. Northern Pacific & State of Idaho.....	133-135

It is stipulated that the foregoing memorandum of errors in the printed record, and index to printed record, may be filed and included in the record for appeal to the Supreme Court.

S. M. STOCKSLAGER,
Counsel for Appellant, Alva G. Farrell.
C. W. BUNN,

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Counsel for Appellees, Edward Rutledge Timber Company and Northern Pacific Railway Company.

[Endorsed:] Precipe for Certified Transcript of Record on Appeal to the Supreme Court of the United States. Filed August 29, 1919. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3276.

ALVA G. FARRELL, Substituted for Beldon M. Delsay, Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN
PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

*Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of
Record upon Appeal to the Supreme Court of the United States.*

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred seventy nine (179) pages, numbered from and including 1 to and including 179, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above entitled cause including the Assignment of Errors on Appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 29th day of August, A. D. 1919.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

Clerk,

By PAUL P. O'BRIEN,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.
No. 3276.

ALVA G. FARRELL (Substituted for Beldon M. Delany), Appellant,
vs.
EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN
PACIFIC RAILWAY COMPANY, a Corporation, Appellees.

Citation on Appeal.

UNITED STATES OF AMERICA, etc.:

To Alva G. Farrell, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington in the District of Columbia, within sixty days after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's office for the United States Circuit Court of Appeals for the Ninth Circuit from a decree made and entered on the 19th day of May, 1919, in the above entitled cause, wherein the Edward Rutledge Timber Company and Northern Pacific Railway Company were appellees, and you, Alva G. Farrell, were appellant, to show cause, if any there be, why the decree rendered against the said Edward Rutledge Timber Company and Northern Pacific Railway Company, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Hunt, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 15th day of July, 1919.

WM. H. HUNT,

*Judge of the United States Circuit Court
of Appeals for the Ninth Circuit.*

Due service of the foregoing citation on appeal, and receipt of a copy thereof, is hereby acknowledged this 31 day of July, 1919.

A. H. KENYON,

S. M. STOCKSLAGER,

Solicitors for Alva G. Farrell.

[Endorsed:] Docketed. Original. United States Circuit Court of Appeals for the Ninth Circuit. No. 3276. Alva G. Farrell (substituted for Beldon M. Delany), appellant, vs. Edward Rutledge Timber Company, a corporation, and Northern Pacific Railway Company, a corporation, appellees. Citation on Appeal. Filed Aug. 18, 1919. F. D. Monkton, Clerk. By Paul P. O'Brien, Deputy Clerk. Stiles W. Burr, Horace H. Glenn, Attorneys at Law, Merchants National Bank Bldg., St. Paul, Minn.

Endorsed on cover: File No. 27,292. U. S. Circuit Court Appeals, 9th Circuit. Term No. 537. Edward Rutledge Timber Company and Northern Pacific Railway Company, appellants, vs. Alva G. Farrell. Filed September 8th, 1919. File No. 27,292.



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Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 172.

EDWARD RUTLEDGE TIMBER COMPANY AND
NORTHERN PACIFIC RAILWAY COMPANY,

APPELLANTS,

vs.

ALRA G. FARRELL,

APPELLEE.

BRIEF FOR APPELLANTS.

PRELIMINARY STATEMENT.

Insofar as it involves the question (and the sole question) considered and decided by the Circuit Court of Appeals, this case is practically identical with *West v. Edward Rutledge Timber Co.*, 244 U. S. 90. Both cases involve a selection of unsurveyed land by the Northern Pa-

cific Railway Company under the exchange provisions of the act of March 2, 1899 (30 Stat. 993), and the question is as to the sufficiency of the description of the selected land contained in the Railway Company's selection list; which described the land selected as the "tract *which when surveyed will be described* as Section 20" of the designated township and range.

In both cases it was argued that a description in these terms, of land not yet surveyed, was insufficient under that clause of the act of 1899 which provides that "if the selected land be unsurveyed" the selection list "shall describe such tract in such manner as to designate the same with a reasonable degree of certainty." The land involved in the two cases is in adjoining townships; the physical characteristics of the country are the same. The two selection lists were identical in form and substance. In the West case the description was held good by the concurring decisions of the District Court, the Court of Appeals and this Court. Yet in the case at bar the Court of Appeals, in the teeth of its own decision and the decision of this Court in the West case, and by a process of reasoning we find it hard to follow, held the description insufficient and reversed the decree of the District Court upholding the Railway Company's selection. Hence this appeal.

This question of the sufficiency of the form of description used in the Railway Company's selection list was the sole question considered by the Court of Appeals. And its decision went on exceedingly narrow lines. It undertook to distinguish the West case on the ground (and the sole ground) that in the West case the land selected was but $3\frac{1}{4}$ miles from the nearest surveyed line then established, while in the case at bar the land was $7\frac{1}{2}$ miles from the

nearest established line. Upon this difference in distance alone (no other ground of distinction being suggested—or possible) the Court of Appeals arrived at a conclusion flatly opposed to its own decision and that of this Court in the West case, as well as the decision of the District Court in the case at bar.

In the West case the District Court and the Court of Appeals held that the question whether a description in terms of future survey is sufficiently definite and certain to satisfy the requirements of the act of 1899, is a question of fact, or of mixed law and fact, upon which the decision of the Department of the Interior is conclusive; and that reasoning was accepted by this court as sufficient to dispose of the case. In the case at bar the Court of Appeals, while conceding that the sufficiency of such a description is a question of fact, sought to avoid the well-known rule that the decision of the Interior Department on a question of fact is conclusive (in the absence of fraud or mistake), and cannot be re-examined in the courts, by saying that the record in this case does not disclose that the Department considered the sufficiency of this description as a *question of fact*, but rather that it upheld the selection by the application of a general rule of law. In this, as we shall show, the Court of Appeals fell into manifest and flagrant error with respect to the state of the record in this case, as well as with respect to the principles of law controlling cases of this character.

STATEMENT OF THE FACTS.

As pointed out in the decision of this court in the West case (244 U. S. 90), the Act of March 2, 1899 (30 Stat. 993) was passed in furtherance of a design of the Government to obtain title to certain lands in the Mt. Ranier National Park then owned by the defendant Railway Company in fee—most of which were still unsurveyed. Accordingly Section 3 of that act provides that upon filing a proper deed of relinquishment "said company is hereby authorized to select an equal quantity of non-mineral public lands * * * lying within any state through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished." Section 4 of the act is as follows:

"That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. *In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty;* and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company

shall be permitted to describe such tract anew, so as to secure such conformity."

By regulations originally adopted by the Interior Department in the administration of similar lieu selection acts previously enacted, permitting the selection of unsurveyed lands, which regulations were by the Department made applicable to selections under the act of 1889, it was provided:

"Every selection of unsurveyed lands must designate the same by the description by which it will be known when surveyed, if that be practicable; or if not practicable, must give with as much precision as possible the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of public survey come to be extended."

Daniels v. Northern Pacific, 43 L. D. 381.

Hansen v. Northern Pacific, 38 L. D. 491.

West v. Edward Rutledge Timber Co., U. S. C. A., 221 Fed. 30, 33.

On July 23, 1901, the Railway Company duly filed in the local land office at Coeur d'Alene, Idaho, its selection list No. 71, whereby it selected certain unsurveyed lands, describing them as "*tracts of land which, when surveyed, will be described as follows:*" There follows a description, by section, township and range, of the tracts selected; among them being Section 20 in township 43 North, range 4 east, of which the land here in controversy—the northeast quarter of said Section 20—is a part. (Transcript, pp. 102-107.) This selection list was in all respects identical in form and substance (save only as to the particular lands described) with the list under consideration

in the West case. See pages 49-54 of the Transcript in the West case. And it will be seen that it is in exact compliance with the rule prescribed by the Department itself. The selection list so filed was, like the list in the West case, accepted and approved by the Register and Receiver. (Tr. 106-107.)

Two years after this selection was made—that is, in June or July, 1903—Belden M. Delany, to whose interest plaintiff succeeded, settled on the land in controversy, and resided thereon at intervals up to the time of his death. The township was still unsurveyed, but the south line of Township 45, Range 4, and the east line of Township 43, Range 2, had previously been surveyed. The nearest of these lines was $7\frac{1}{2}$ miles from the tract in question; the other slightly further. (Tr. 58, 67, 169.)

June 4, 1909, the approved township plat of survey was filed in the local land office at Coeur d'Alene. On the same day the Railway Company duly filed its "re-descriptive list," describing the selected lands anew according to the survey, in compliance with the provisions of Section 4 of the act of 1899, and the regulations and practice of the Interior Department. (Tr. 108-111.) The regularity and sufficiency of this redescriptive list stands unquestioned.

June 10, 1909, a few days after the filing of the township plat of survey and the Railway Company's "re-descriptive list," Delany tendered an application to enter the land under the homestead law, alleging settlement on July 2, 1903. (Tr. 126.) This application was rejected by the Register and Receiver and, on successive appeals, by the Commissioner of the General Land Office and the Secretary of the Interior. Petitions thereafter filed by Delany, for a re-hearing and for the exercise of the super-

visory power of the Secretary, were denied by the Secretary. (Tr. 126, 118-125.)

Finally, the Railway Company's selection having previously been approved by the Secretary, a patent for the land in suit was duly issued to the Railway Company on June 6, 1916. (Tr. 127-130.) And on July 17, 1916, the Railway Company conveyed the land to the defendant Timber Company in fulfillment of previous contract. (Tr. 16, 34, 53-54.)

Shortly after the issuance of patent and the conveyance to the Timber Company, Delany commenced this suit in equity in the District Court, naming the Railway Company and the Timber Company as defendants—as in the West case. And as in that case, the theory of the complaint was that the defendants were chargeable as trustees of the patent title, on the ground that the Department of the Interior committed an error of law in holding the Railway Company's selection valid and awarding it patent for the land.

Delany died before the suit was brought to trial, and the present plaintiff Farrell (for convenience we refer to the parties as "plaintiff" and "defendants," as in the District Court), who had succeeded to Delany's interest as an heir and by conveyance from other heirs, was substituted as plaintiff.

It is to be borne in mind that Delany did not initiate his settlement claim until two years after the land had been selected by the Railway Company. No question of priority is involved. It is true that the bill of complaint alleges that Leach, a former settler whose cabin and improvements were taken over by Delany, first went on the land in April, 1901. (Tr. 9.) But at the trial this alle-

gation was withdrawn, and it was admitted that Leach did not go on the land until 1902, a year after its selection by the Railway Company; thus removing from the case a question which was made a rather prominent feature of the pleadings. (Tr. 57-58.)

The Railway selection was attacked on two grounds: First because of the supposed insufficiency of a description in terms of future survey; and second, upon the theory that an attempted application for survey under the act of August 18, 1894, made by the Governor of Idaho a few days before the Railway Company's selection list was filed, operated as a "withdrawal" or "reservation" of the land, so that it was not subject to selection under the Act of March 2, 1899. We believe it will serve better, as being less likely to create confusion, to defer the detailed statement of the facts involved in this latter point until we come to the discussion of that question later in this brief; since the point was not considered or passed upon in any way by the Court of Appeals.

The District Court (Judge Dietrich) sustained the Railway selection against both grounds of attack—holding the description in the selection list sufficient under its own reasoning and that of the Court of Appeals and this Court in the West case—and entered a decree dismissing the bill. (Tr. 136-146.) Thereupon plaintiff took the case to the Court of Appeals. That Court, as we have indicated, held the description insufficient and reversed the decree—upon the theory already alluded to—without passing upon the question involving the State's application for survey. (Tr. 157-160.)

In the statement prefixed to its opinion (Tr. 157-158) the Court of Appeals says: "The facts *as found by the court below* are, etc." This is quite misleading. The recital of facts which follows it is *not* taken from the findings of the trial court. (Tr. 136-146.) It seems to have been taken, almost literally (although with some condensations and omissions), from the brief filed in that court by counsel for the present appellee; and it incorporates some of the inaccuracies and misstatements of that brief. Comparatively few of the recitals are really of "facts as found by the court below." Some of the recitals are rather hard to reconcile with the findings, if not actually in conflict. And some are quite without support in either findings or evidence. For illustration, compare the recitals regarding the acts of settlement, residence, cultivation, etc., by Delaney and his predecessor, Leach, which the opinion of the Court of Appeals sets forth as "facts found by the court below," with what the trial court actually said on that subject (Tr. 137-138). Or search the record (it will be searched in vain) for a finding that when Leach and Delaney made their respective settlements either was without knowledge or notice that the land had previously been selected by the Railway Company—or for evidence which could lend any support for such a finding, if it had been made. Or, on the very important point of the language in which the land is described in the selection list, contrast the somewhat misleading recital of the opinion (Tr. 158) with the terms of the selection list itself (Tr. 104.)

These inaccuracies may be of no great importance—in our view of the case they are, of course, immaterial. But taken together they give the case a color and twist which tends to convey a false impression—especially as to what

counsel called the "equities" of the claimant Delaney. And some such sort of an impression seems to have influenced the Court of Appeals itself. (Tr. 160.)

It must go without saying that we do not for a moment doubt the complete sincerity and good faith of the eminent judges who participated in this opinion. But we think the opinion evinces an unfortunate looseness of grasp of the facts and the record. Nothing less could explain the court's extraordinary error respecting the issues decided by the Land Department, which error is the very foundation of the decision appealed from.

SPECIFICATION OF ERRORS.

1. The Court erred in holding that W. B. Leach, the first alleged settler on the land in controversy, had no knowledge at the time of his alleged settlement upon the land of the filing by the Northern Pacific Railway Company of the lieu selection list referred to in the Court's opinion.
2. The Court erred in holding that Belden M. Delany, who afterwards settled on said land, did not know at the time of his settlement thereon of the filing of said selection list by said Northern Pacific Railway Company, and did not know that an attempt had been made to appropriate the land, either by the State of Idaho or by the Northern Pacific Railway Company.
3. The Court erred in holding that said Delany continuously made his home on the land in controversy after his settlement thereon, and that he improved and cultivated said land and resided thereon to an extent sufficient to constitute compliance with the conditions of the homestead law.
4. The Court erred in holding that by his letter to said Delany dated December 16, 1919, the Commissioner of the General Land Office sustained the decision of the local land officers rejecting said Delany's application on the ground that the State of Idaho had acquired a prior right to the land and ruled that said application was properly rejected on that ground.
5. The Court erred in holding that the Secretary of the Interior and the officials of the Department of the In-

terior did not determine and decide as a question of fact that the description of the land in controversy contained in the said selection list of said Northern Pacific Railway Company designated the land selected with a reasonable degree of certainty, and in holding that the decisions of the Secretary of the Interior rejecting said Delany's application do not state or show that such rejection was supported by the facts.

6. The Court erred in holding that the Secretary of the Interior and the officials of the Interior Department, in passing on the case, did not take into consideration the particular circumstances attending the selection of said land by the Northern Pacific Railway Company, and in holding that said Secretary of the Interior and said Department officials did not decide that the description of said land in its selection list was reasonably sufficient, as applied to the particular tract of land involved in this suit.

7. The Court erred in holding that the description of the land selected by the Northern Pacific Railway Company contained in its said selection list (including the land in controversy in this suit) was not sufficient to designate said land with a reasonable degree of certainty, within the intent and meaning of the act of March 2, 1899.

8. The Court erred in holding that the Northern Pacific Railway Company did not acquire full and complete title, legal and equitable, to the land in controversy, under the patent of the United States issued to it.

9. The Court erred in reversing the decree of the District Court dismissing the bill of complaint herein, and in making and entering a decree in favor of the appellant Farrell.

ARGUMENT.**I.**

It is a familiar and well settled rule of law that where, in passing upon a claim to a tract of public land, either as between conflicting claimants or as a preliminary to the issue of patent, the Department is called upon to determine a question of *fact*, or of *mixed law and fact*, its determination is final and conclusive and not subject to re-examination by the courts.

Marquez v. Frisbie, 101 U. S. 473, 475.

Ross v. Day, 232 U. S. 110, 116.

Whitcomb v. White, 214 U. S. 15.

Ross v. Stewart, 227 U. S. 530, 535.

Shepley v. Corran, 91 U. S. 330, 340.

Vance v. Burbank, 101 U. S. 514, 519.

Now it is manifest that the question whether the form of description used in the Railway Company's selection list was sufficient to "designate the land with a reasonable degree of certainty" within the intent of the Act of 1899, is essentially a question of fact—or, at most, a question of mixed law and fact. This would be true in any case, but it is peculiarly and strikingly so in the present instance. For the ground upon which the selection is attacked, and upon which the Court of Appeals held the description insufficient, is based entirely upon physical conditions peculiar to this particular tract of land—matters *in pais* and not of record. Conceding that the description would have been good if the land had been no more than 3½ miles distant from the nearest surveyed line, as in the West case; the Court of Appeals held the description bad

because the land was $7\frac{1}{2}$ miles distant from surveyed line. Further, it is implied that this distance would not be objectionable in a level or open country, but is so great as to be fatal to the certainty of the description, because the country is rough, broken and heavily timbered (which, by the way, was equally true in the West case). The theory held by the Court of Appeals seems to be that the sufficiency of description must be determined anew in each particular case, with reference to the conditions peculiar to that case. And it is apparent that the question whether the description identifies the land with a requisite degree of certainty is made to turn wholly upon consideration of physical conditions peculiar to the given tract. Can one conceive of an issue which more plainly involves nothing but questions of fact?

This court said in *Burfenning v. Chicago, etc., Ry. Co.*, 163 U. S. 321, 323:

"It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. *Johnson v. Towsley*, 13 Wall. 72; *Smelting Company v. Kemp*, 104 U. S. 636; *Steel v. Smelting Company*, 106 U. S. 447; *Wright v. Rose-*

berry, 121 U. S. 488; Heath v. Wallace, 138 U. S. 573; McCormick v. Hayes, 159 U. S. 332."

In the West case (221 Fed. 30, 32) the Court of Appeals said:

"To prevail, the plaintiff must sustain the position that the description contained in the Railway Company's selection list first filed was, as matter of law, insufficient to support the selection, for if it depended on a matter of fact the controversy would have been settled by the judgment of the Land Department in rejecting the application of West for homestead entry and approving the selection of the Railway Company (citing and quoting from Burfening v. Chicago, etc., *supra*.)"

By the concurring decisions of the Court of Appeals and this Court in the West case (244 U. S. 90, 99) it is definitely settled that the sufficiency and certainty of the description in the Railway Company's selection list is not open to question as matter of law. And upon the question of fact, the judgment of the Land Department is final and conclusive, under the authorities cited.

2.

But in the case at bar the Court of Appeals took a brand new position. And in the effort to square this position with its own decision and that of this court in the West case, and with the rule of law just referred to, it evolved a most extraordinary theory respecting the action of the Department—so extraordinary that it must be stated in the language of the court itself. Nothing else could do it justice. The Court says:

"The appellees contend (1) that the lands were designated with a reasonable degree of certainty, and (2) that the acceptance of the list and the issuance of patent by the Land Office involved the finding of fact that the lands were designated with a reasonable degree of certainty, and that such a finding of fact is conclusive. We find in this case no decision of fact that the description of the land as listed by the Railway Company designated the same with a reasonable degree of certainty. The record shows on the contrary that no decision was made on the facts of the case, and that the action of the Land Office was but the application of a settled rule of practice which it followed in all cases, that all unsurveyed lands listed by a Railway Company as lien lands are to be designated with a reasonable degree of certainty if they are designated by a description applicable to them after they shall have been surveyed. Thus, on the appeal the decision of the Secretary of the Interior states not that the rejection of Delany's application was supported by the facts, but that it was supported by the reasons given by the Department in its decision in *Daniels v. Northern Pacific*, 43 L. D. 381. Turning to that decision we find it stating that all lists filed for lien lands by railway companies were accepted under general regulations of the Department in every case where the lands were described in the terms of future survey, and the decision points to the Act of Congress of July 1, 1898, which provided that lands under that Act be selected in terms of a future survey, as sanctioning the propriety of the settled practice of the Land Department. * * * In the present case it is clear that the particular circumstances attending this lien land selection were not taken into consideration by the Land Department. They did not decide that the description was reasonably sufficient, as applied to this particular tract of

land. They applied only a rule of practice and in so doing decided a question of law and not a question of fact." (Tr. 158-159.)

And thus reasoning that it was free to consider the question *de novo*, unhampered by any previous determination by the Land Department, the Court of Appeals argued to the conclusion that inasmuch as the selected land was $7\frac{1}{2}$ miles from an established survey line, and the intervening country was rough and broken, it would be difficult to tie the description back to the existing surveys; and, therefore that the description was insufficient to identify the land.

But the trouble with the reasoning quoted from the Court's opinion is that it is flagrantly in the teeth of the facts in the record. Let us see. The keystone of the Court's theory is in the statement: "Thus, on the appeal, the decision of the Secretary of the Interior states not that the rejection of Delaney's application was supported by the facts, but that it was supported by the reasons given by the Department in its decision in *Daniels v. Northern Pacific*." This refers (as the context shows) to the Secretary's decision of November 18, 1915, on Delaney's original appeal from the General Land Office. Even as to that decision we submit that a little attentive consideration of the record will demonstrate that there is no support for the interpretation given it by the Court of Appeals (Tr. 119-121). But it is easier to pass that point without discussion. For it is manifest that the Court of Appeals wholly overlooked the proceedings which took place in the Department after the decision of November 18, 1915, was promulgated.

First, Delaney filed a motion for rehearing, which was denied by the Secretary January 29, 1916. (Tr. 121-122.) In that motion, and in the brief which accompanied it (both of which are part of the record of the case in the Land Department), Delaney specifically urged the very grounds of objection to the description in the railway selection list which were relied upon in the courts below, and upon the strength of which, alone, the Court of Appeals held the description insufficient and the selection bad; viz.: the supposed difference from the facts and conditions of the West case, the greater distance from the nearest established line of survey, the rough, mountainous and timbered character of the intervening country, and the practical difficulty of identifying the land by this description. In denying the motion Assistant Secretary Jones said: "The questions raised in the motion for rehearing *were all considered by the Department*, and disposed of in the decision complained of." (This was the decision of November 18, 1915.)

Next Delaney filed a petition for the exercise of the supervisory power of the Secretary, and in this petition and the accompanying brief the same objections were urged, with even greater elaboration. The petition was denied March 11, 1916, in an opinion by Assistant Secretary Jones (Tr. 122-125) in which it is said:

"The act of March 2, 1899, authorized the railroad company to make selections of unsurveyed public lands. Section 4 requires that in case the tract selected should at the time of the selection be unsurveyed the list filed by the company in the local land office should describe the tract 'in such manner as to designate the same with a reasonable degree of cer-

tainty,' and requires a new list to be filed redescribing the land after the survey has been made. The description employed in this particular selection, under the decision in *Daniels v. Northern Pacific Railway Company, supra*, complied with the statute, as it was made with a reasonable degree of certainty. The petitioner's contention as to this feature of the case is accordingly not well founded." (Tr. p. 124.)

We do not know how far this court judicially notices the records of the Land Department, where such a reference is necessary to clear up an apparent ambiguity in a decision of the Department which the court is required to consider. But we assume that it is permissible to refer to such records in circumstances like those of the present case and for the purposes for which this reference is made. However, this is really unimportant. Assuming that the Land Department records cannot be resorted to in aid or explanation of these decisions, the language of these decisions themselves is sufficient to refute the error of the Court of Appeals. This is especially true of the decision of March 11, 1916, on Delaney's petition for the exercise of the supervisory power, where the Secretary said: "The description employed in this particular selection * * * complied with the statute, as it was made with a reasonable degree of certainty."

3.

But suppose it were true (and it is not) that the record in this case failed to show affirmatively that the Department had considered and passed upon the sufficiency of the description as a question of fact. Nevertheless it is clear that there is nothing in the record to furnish the slightest support for the claim that it did *not* do so—nothing to support the inference that it failed to take into consideration all the factors of location and physical and geographical conditions. The most that could possibly be said is that there is a lack of *affirmative* showing that these questions were considered and decided; although it sufficiently appears that they were before the Department and that their consideration was necessary to a proper disposition of the case. And under well-settled rules it must be presumed that in deciding the case and awarding patent to the Railway Company the Department, in the performance of its plain duty, considered and decided all questions essential to the determination of the rights of the contesting parties and the right of the Railway Company to patent.

Some of the well-known rules, established by the decisions of this Court, are here brought into play. A patent for land is not only a conveyance; it is also the judgment of a quasi-judicial tribunal to which questions relating to the disposition of the public lands are confided, that the patentee is entitled to the land. It is impervious to collateral attack or by action at law and may only be attacked by direct suit in equity. In such a suit, the patent is conclusive upon all questions of fact or mixed law and

fact actually decided by the Department, or necessarily involved or implied in the determination that the patentee is entitled to the land. No inferences or presumptions will be indulged adverse to the patent title. The patent imports an adjudication by the Department of the existence of every fact necessary to entitle the patentee to the land; and this adjudication cannot be overthrown by inference, presumption or evidence susceptible to differing constructions. The burden is always upon the party attacking the patent title. And where there is any conflict or uncertainty in the showing, or where conflicting inferences may be drawn from the evidence, although undisputed, the burden is not sustained, and the patent will control.

Smelting Co. v. Kemp, 104 U. S. 646.

Lee v. Johnson, 116 U. S. 48.

Maxwell Land Grant Case, 121 U. S. 325, 379, 381.

Quinby v. Conlan, 104 U. S. 426.

Marquez v. Frisbie, 101 U. S. 473, 475.

Ross v. Stewart, 227 U. S. 530, 535.

Ross v. Day, 232 U. S. 110, 116.

Leonard v. Lennox (C. C. A. 8th Cir.), 181 Fed. 760, 762.

United States v. Beaman (C. C. A. 8th Cir.), 242 Fed. 876, 879.

Conkling Mining Co. v. Silver King, etc., Co. (C. C. A. 8th Cir.), 230 Fed. 553, 558.

In the case last cited the Court said:

"A patent of land within the jurisdiction of the Land Department of the United States, and this land was within its jurisdiction, is the judgment of that tribunal upon the evidence before it that the patentee

is entitled to the land therein described and the conveyance of the legal title to the land to the patentee in execution of the judgment. The Land Department is a special tribunal vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and its judgment, evidenced by its patent, is conclusive of the right of the claimant and of the United States to such land and of every issue which it was necessary for the Land Department to decide in determining those rights. The validity, the extent and the boundaries of the claim in this case, and in every case, are unavoidable issues which it must adjudge in sustaining any part or all of the claim in hand, or any other claim of this character. * * *

4.

We have discussed the case thus far under the implied concession that the Department might properly consider the sufficiency of description in each selection list, as a question independent of the general rules and regulations previously prescribed by it. But this is far from our real view.

In the Act of 1899 Congress merely provided that where unsurveyed land was selected the selection list should describe the land "so as to designate the same with a reasonable degree of certainty," and left it to the Land Department to determine and prescribe what form of description would meet this requirement. In discharge of the duty thus imposed upon them, the officers of the Land Department determined that a description in terms of future sur-

vey was not only sufficiently definite and certain to comply with the terms of the act, but was the best, most convenient and most practical form of description. For in the regulations to which reference has already been made, the Land Department not only *permitted* this form of description, but made it mandatory and exclusive—save in exceptional cases with which we are not here concerned.

In the disposal of the public lands, Congress must necessarily leave to the administrative officers of the Land Department the decision of many important questions which arise in the administration of the laws enacted by Congress. It is not feasible, nor wise, for Congress, by legislative enactment, to prescribe in precise detail every step or formality which shall be observed by those seeking to acquire the public land. So in the act of 1899 it was left to the Department to determine what forms of description would, from time to time under actual existing conditions, best satisfy the requirement of "reasonable certainty."

And there was a special propriety in committing this question to the administrative discretion of the Land Department. Considering the nature and character of its duties, its knowledge, and its daily experience in the administration of this and similar acts, the Department would be supposed to know better than anyone what form of description would best serve the purpose of the law, and would in the best and most practical way satisfy the requirement of certainty.

Now it seems to us obvious that when the Department came to consider and determine this question, and when in so doing it permitted and prescribed the form of description used by the Railway Company in this case, it considered and decided a question of fact—or, if you will,

of mixed law and fact. And when the Railway Company has proceeded in accordance with the directions thus prescribed by the Department, and in the only manner permitted by those directions, and its selection has been approved by the Secretary and patent issued to it, its title is not open to attack on the ground that the Department might better have prescribed a different form of description.

In *Groeck v. Southern Pacific Railway Co.* (C. C. A.), 102 Fed. 32, 34, the Court said:

"Considering the language of the grant, it must be held that indemnity lands are selected under the direction of the Secretary of the Interior whenever the grantee thereof complies with the directions which the Secretary has published for the regulation of such selection. The Secretary was not clothed with the power to defeat the grant of the indemnity lands, or by capricious regulation to affect the title which was intended to be conveyed. Nor has the Secretary in this instance made any regulation which has injuriously affected the right of the grantee. He had the power to prescribe in advance the method of making such selection, and, having prescribed it, and his directions having been followed, it cannot be said that the lands were not selected in the manner required by the granting act."

A determination that the description in question designated the land with a reasonable degree of certainty will hardly be called an arbitrary one. To call it this would be to accuse Congress itself of arbitrary action. The act of July 1, 1898, provides in terms that "all selections of unsurveyed lands shall be of odd-numbered sections to be identified by the survey when made." (30 Stat. 620.) The possibility of identifying lands according to the description by which they will be known when surveyed is here distinctly recognized; and surely no court can say that that description is under one law so inadequate as to be arbitrary, which under another law was recognized by Congress itself as being so appropriate that it was specially required.

Nor is it difficult for anyone, acquainted as this Court is with the legislation affecting public lands in the Western states, to understand why that form of selection should have been specified and required. Speaking generally, it is, perhaps, the very best method of designating or describing unsurveyed lands that could be devised. Situations may, of course, be imagined where lands are so remote from any public survey that this form of designation would give little information as to the locality in which they lie. But in the present state of public surveys such situations are not numerous—certainly not along the lines of the land grant railroads; and for many years settlements on unsurveyed lands within the boundaries of the grants to those railroads have been made with direct reference to the description by which they should be

known when surveyed. The grants to the railroad companies included all odd-numbered sections, *whether surveyed or unsurveyed*, which at date of definite location were free from any claims or other rights; and the settler knew when initiating a settlement that if the land settled upon proved to be an odd-numbered section, he must relinquish it to the railroad company. Knowing this, he has made his settlement with direct reference to the public survey.

As an illustration of the "certainty" of the form of the description used by the Railway Company, suppose that instead of selecting a quarter section by reference to a name by which it would be known when surveyed, the Railway Company had made its selection by a metes and bounds description, tied in to a point of commencement on the nearest line of survey. This would have been just as easy, and just as practicable, for the Railway Company to do, at the time of selection—had it been required. But it was *not* required—it was not even permitted by the Departmental regulations. Such a description would have been not merely "reasonably certain," it would have been mathematically certain. And no one would have assumed to assert that it did not conform to the requirement of certainty in the act of 1899—in fact that is just what counsel has hitherto contended the Railway Company should have done. Yet such a description would have meant no more, for any practical purpose, would have furnished no more definite or certain information, and would have made the land no easier to identify, than the description which was prescribed by the Department and used in the selection list. Every difficulty which the Court of Appeals imagines an intending settler would encounter in an attempt

to identify land described as in the selection list, would be encountered equally if the description were by metes and bounds as illustrated. And in the Daniels case, the Department has pointed out the reasons why a description in terms of the survey to be made is more satisfactory, from an administrative standpoint, at least. Furthermore, the Department, the District Court, the Court of Appeals and this Court (in the West case) have pointed out that the description actually used and the metes and bounds description suggested, are the exact equivalents of each other—except from the standpoint of practical convenience, which favors the form actually prescribed and used.

6.

But there is another, and quite independent reason, why the selection must be sustained, regardless of the view which the courts may now take as to the wisdom, propriety or correctness of the rulings and regulations of the Department prescribing the form of description now under attack.

It is a well settled rule of law that where a party has proceeded, in the acquisition of rights under the public land laws, in the manner prescribed by the Department with respect to matters of practice and procedure, his rights are not to be defeated upon the ground that the practice thus established was rooted in an incorrect construction of the law or in unsound views of administrative policy. It has been shown that the selection attacked in

this case was made in exact compliance with the practice established by the Department shortly after the passage of the act of 1899, and steadfastly maintained and upheld by it without change for many years thereafter; and rights founded thereon cannot now be destroyed because it is conceived that the practice was wrong, even though this Court should be of the opinion that the act was not rightly construed by the Department in the first instance.

The principle upon which this proposition rests has been established by numerous decisions of the Department and the courts; and is one of fundamental equity and justice. It recognizes that where the question is one of substantive law—where it is a question whether the land is subject to the particular form of appropriation, or whether the claimant is of the class entitled to take such land—the departmental construction of the statute is not necessarily binding upon the courts. But where the question is one of *practice and procedure merely*, and where the claimant has, in compliance with the rulings of the Department, taken the particular steps required by departmental regulations, in the manner prescribed by the Department under its construction of the act, he is not to be deprived of his rights upon the ground that such construction was ill-advised and that a different mode of procedure should have been prescribed. This principle rests upon the just and wise basis that a claimant, on whom the statute has conferred the right to acquire title to particular land, ought not to be penalized for his obedience to the rules laid down by the officers to whom the administration of the law is confided.

Turning first to the decisions of the Department, we find numerous cases in which the precise question was directly

considered. The leading case appears to be *Mary R. Leonard*, 9 L. D. 189. In that case a timber-culture claimant had made proof of entry and cultivation in compliance with the practice in force at the time of the entry; but by a decision subsequently rendered it was held that this practice was based upon an erroneous construction of the timber-culture law. The Department nevertheless held that the entryman was protected by compliance with the previous practice, even though erroneous, and Secretary Noble said:

"Under the latter, which it is not denied by the counsel for the petitioner, is the correct construction of the law, the proof was insufficient. It is contended that inasmuch as the proof was in accordance with the law as construed when it was offered and accepted, that the subsequent change of construction should not be held to operate retroactively so as to invalidate it. In the case of *Miner v. Mariott*, 2 L. D., 709, it is said by this Department, that though 'a construction is clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation.' * * * In its practical administration, the law must be held to be what for the time being it is construed to be by the tribunals lawfully constituted for that purpose. This course is not only dictated by the necessity of the case, but is in accordance with reason and justice. To give a retroactive effect to a change of construction by a court or other tribunal, so as to render illegal acts which have been performed with trouble and expense in accordance with and on the faith of the former construction would seem to be as 'unjust as to hold that rights acquired under a statute may be lost by its repeal.'"

Miner v. Mariott, 2 L. D., 709, cited in the *Leonard* case, is another leading authority. In that case it was held that a previous practice of the Department with respect to the time within which an adverse claim might be filed, was erroneous, being founded upon a wrong construction of the statute. But the Secretary held that the claimant was protected by his compliance with the practice previously sanctioned, saying:

"The rule of this decision should not operate to interfere with or take away any rights acquired under the law as it has heretofore been construed by your office. Though that construction is, in my opinion, clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation. Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal."

In *Henry W. Fuss*, 5 L. D., 167, cited in the *Leonard* case, assignments of desert-land entries made while a rule allowing the same was in force were recognized, notwithstanding that rule was founded upon what was afterwards held to be an erroneous interpretation of the statute. Secretary (afterwards Mr. Justice) Lamar said:

"Although it is silent on this question, I think a reasonable construction of the act as a whole, its purpose and intent being considered, warrants the rule against assignment; but being a matter of construction, or more correctly speaking of administrative policy, and a question which has been involved in some doubt, as would appear from the fact that the rule has been changed, the regulation of your office which recognized the right of assignment had, until revoked, or overruled, the force and effect of law, so

that rights acquired and valid thereunder should be protected."

In *Cudney v. Flannery*, 1 L. D., 165, Secretary Teller said:

"The regulations and rules of your office and of this Department in force at the date of Flannery's entry have the force of law as respected a tract subject to entry. There was then no objection to such an entry, and Flannery's was allowed as legal and made in accordance with what was considered a correct interpretation of the statute. *He thereby acquired rights which cannot now legally or equitably be repudiated * * * even though such an entry might not now be allowed. The latter rulings cannot have this retroactive effect.*"

In *David B. Duke*, 3 L. D., 214, Secretary Teller said:

"I think it immaterial that the construction was erroneous and unwarranted, so long as it was the official announcement of the law by the Land Department. * * * I do not understand that a party acts under a misapprehension of the law, so as to lose any right, when he acts under its official interpretation. The misapprehension in such a case is upon the part of the interpreting authority, and not upon him who in the prosecution of a claim conforms to such interpretation. A different rule would permit every person to construe the law for himself; and hence, your office being a proper exponent of this law, entrymen and their assignees acting under such exposition should not be required to forfeit any right by subsequent construction inconsistent with the first."

The instructions of July 16, 1889, 9 L. D., 86, contain the following language:

"But if the entry was made under rulings of the Department in force when the application was made, that ruling should be allowed to stand and control the case. Until a rule is changed it has all the force of law and acts done under it while it is in force must be regarded as legal. * * * It seems to me that, inasmuch as the Department from the time of the passage of the bill up to the circular of the date of June 27, 1887, erroneously construed the true spirit and intent of the act, and in pursuance thereof numerous entries have been made under the law as thus promulgated, amounting to some 2,500 or more, that such entries should be protected under the construction thus given the act, giving such construction all the force and effect of law. Were it not so, great wrong and inconvenience would result. In this character of entries it has been repeatedly held that, if the entry is made under rulings of this Department in force when the application is made, it should be allowed to stand. Until a rule is changed it has all the force of law and acts done under it while it is in force must be regarded as legal."

In *C. P. Masterson*, on review, 7 L. D., 577, it was said:

"It is evident that such action was not inadvertence, but an erroneous construction of the law. The entry in the present case was allowed under the practice then prevailing in your office. It has been held by the Department that where a decision operates to change a practice or rule well established, especially if it be upon a point of interpretation not without difficulty, the action already taken by private parties in good faith under the prevailing practice may be sustained in proper cases; and although such construction may have been erroneous, it does not follow that any acts which have been performed in pursuance of or in accordance with such construction or interpretation, are necessarily illegal."

The same doctrine has been applied, in varying language and under various sets of circumstances, in a great number of departmental decisions, among which are the following:

Milne v. Ellsworth, 3 L. D., 213.
Isham Floyd, 5 L. D., 531.
James Spence, 6 L. D., 217.
Candido v. Fargo, 7 L. D., 73.
C. P. Masterson, on review, 7 L. D., 577.
William Thompson, 8 L. D., 191.
John M. Lindback, 9 L. D., 284.
J. H. Koppred, 10 L. D., 93.
Jacob Osgold, 11 L. D., 155.
James Lee Lode v. Little Fourpough Lode, 11 L. D., 391.
Oro Pioneer Claim, 11 L. D., 457.
Edwin F. Frost, 21 L. D., 38.
Tustin v. Adams, 22 L. D., 266, 270.
Ella J. Dickey, 22 L. D., 351.
State of California, 22 L. D., 428.
Kirk v. Brooks, 24 L. D., 448.
Lobathe v. Roberts, 25 L. D., 297.
Rough Rider and Other Lode Claims, 42 L. D., 284.

In Germania Iron Co. v. James (C. C. A. 8th Circuit), 89 Fed. 811, Judge Sanborn said:

"The reasonable and established rules and practice of judicial tribunals become as much a part of the law of the land as the statutes under which they act. * * * Moreover, the rule and practice here under consideration stand upon far higher ground than the ordinary rules for the mere conduct of proceedings in courts. They condition the inception, the foundation,

the very existence, of all rights and title to this land. Rights initiated in accordance with them becomes vested interests in property, and attempts to establish rights in violation of them were as though they had not been. They had become an established rule of property, upon which men relied and had the right to rely. The maxim, 'Stare decisis, et non quieta novare,' applies nowhere more universally, or with more salutary effect, than to those rules and that practice under which property is acquired or secured. It is often far more important that these should be certain and changeless than that they should be right. * * * Nor was it within the supervisory power of the Secretary or of the Commissioner to set aside or annul rights acquired under this rule and practice, or to deprive Hartman of his title to this land, by a retroactive decision, made five years after his right to it had vested, to the effect that the established rule or practice when he made his entry was either inconvenient or erroneous. They might undoubtedly have made and promulgated a new rule which would have governed cases arising after a new rule of practice had been made and had become known, but Hartman and the other applicants * * * had the right to the determination of their claims according to the practice as it then existed. Retroactive decisions of judicial tribunals are as vicious and ineffectual as retroactive laws. * * * System, order, and the uniform application of the laws, the rules, and the practice to all litigants alike, are as essential to the administration of justice in the Land Department as in the courts."

On a second appeal in the same case (*James v. Germany Iron Co.*, 107 Fed. 597) the same learned judge said:

"The rights of these parties vested on February 23, 1889. They were initiated under and conditioned by

the laws of the land and the rules and practice of the Department on that day, and no subsequent rules, decisions, or practice could divest them of the property they then secured, or deprive them of their equitable or legal rights to the title to the land which they then acquired. * * * Even if the opinions cited against it had decided that the rule was abrogated or limited, they would have been nothing more than erroneous judgments. They could not have affected the rule. * * * Nothing short of an express and formal repeal or abrogation of the rule and public notice thereof by the Secretary, who alone had the power to establish and overthrow rules, could have destroyed its force or limited its terms. * * * Hartman had the right to rely upon this rule and practice, and to secure this land in accordance with it."

A great leading case on the subject is *United States v. MacDaniel*, 7 Pet. 1, 14. And we may say in passing that we have found no case in which the principle of the *MacDaniel* case has been questioned or its authority doubted. That case arose upon an attempt to recover from a clerk in the Navy Department special allowances paid him under a practice or usage in force in the Department, which was afterwards abrogated. There was no specific rule, regulation or decision sanctioning such payments—the matter was merely one of customary usage and practice in the Department. It was admitted that there was no statutory authority for such payments. This Court held the new ruling valid and effective as applied to subsequent transactions, but also held that although this new ruling might be based upon a true construction of the law, and might properly have been applied in the first instance, yet it could not be given a retroactive effect in derogation of

past transactions founded upon a construction theretofore given the law by the Department, as established by its previous usage and practice; and the judgment of the court denied recovery of the sums paid. In this connection it was said:

"A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of any department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. * * * Hence, of necessity, usages have been established in every department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given it, and must be considered binding on past transactions."

In *United States v. Newport News, etc., Co.*, 178 Fed. 194, the Court of Appeals of the Fourth Circuit applied the doctrine of the *MacDaniel* case to the construction of a contract between the Government and a shipbuilding company, holding the latter protected by customary practice in previous transactions. The court quoted from the *MacDaniel* case the language set forth above, and upon that authority held that the course of customary practice in previous transactions between the Government and its contractors must be deemed to have established a rule in the light of which the contract should be construed; so that a different requirement, although supported by the

terms of the contract itself, would be equivalent to a retroactive change in established usage which could not be made to the prejudice of rights already initiated, under the principle established by the *MacDaniel* case.

And as lately as *Haas v. Henkel*, 216 U. S. 462, 480, and *United States v. Birdsall*, 233 U. S. 223, 231, this court has quoted with approval the language of *United States v. MacDaniel*, to which reference has already been made.

In *State v. Kelsey*, 44 N. J. L. 1, 22, the New Jersey court quoted with approval the following language of the Supreme Court of Massachusetts in *Rogers v. Godwin*, 2 Mass. 477:

"And although if it were now *res integra* it might be very difficult to maintain such construction, yet at this day the *argumentum ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long-continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words."

In *United States v. Hammers*, 221 U. S. 220, which involved the question of the assignability of desert land entries, this Court said:

"We do not find the act of 1891 as clear as the learned District Court did, and must give to decisions of the Land Department the weight to which in such case, the court acknowledged, they are entitled. * * * Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the *practice of*

the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. *At any rate their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.*"

There is no room for distinction, with respect to the application of the principle declared in the authorities cited, between cases where the rule of practice or procedure which was held to protect a claimant who had complied therewith, was a rule established by express regulation, circular or instruction, or a rule not founded upon express regulation or decision, but built up by custom, usage or practice. Many of the cases cited above are of the latter character. This is true of several of the most important of them, including *United States v. MacDaniel*, *supra*.

In *Haas v. Henkel*, 166 Fed. 621, 627, it was said:

"Such regulations, as held in *United States v. MacDaniel*, 7 Pet. 14, need not be in the form of writing, but may consist of established usages and practices, which have become a kind of a common law of the Department."

And in the very recent case of *United States v. Birdsall*, 233 U. S. 223, 231, Mr. Justice Hughes said:

"Nor was it necessary that the requirements should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities. *United States v. MacDaniel*, 7 Pet. 1, 14."

Let us emphasize the fact that the question is not one having to do with substantive rights under the statute. It is not a question of who can take under the act, or of what land may be taken, or of the extent or character of the appropriation. It is merely a question of *procedure*—of what steps must be taken in order to perfect the right granted. The Department, construing the statute, pointed out the steps to be taken. The Railway Company followed the line thus marked out, faithfully and with exactness. The rights of the respondent Timber Company were acquired on the faith of the regularity of the Railway Company's procedure, in the light of the departmental sanction given it. No one was misled or prejudiced by the fact that the Railway Company pursued the approved practice instead of adopting a different method. The Railway Company could just as well and just as easily have taken another course, and would have done so if the Department had so directed. And it cannot be pretended that appellee's position would be any different or better if the Department had construed the act differently and had required a different course of procedure. Certainly he would not have been benefited if the selection list had described the land by metes and bounds, or in some other manner.

II.

We have indicated that there were two grounds of attack on the validity of the Railway Company's selection; the first based upon the alleged insufficiency of description contained in the selection list (which has already been dealt with), and the second based upon the supposed effect of an application for survey under the act of August 18, 1894 (28 Stat. 372, 394), made by the Governor of Idaho in July, 1901, a few days before the Railway Company's selection list was filed. The District Court sustained the selection against both grounds of attack; and in his able and exhaustive opinion Judge Dietrich gave most consideration to the second point. But the Court of Appeals went off on the point that the description was insufficient, and did not consider or touch upon at all the question involving the application for survey. However, we assume that this question is in the case, and will be urged by appellee in this court, as it was in the courts below.

Appellee's theory is that the application for survey became effective before the land was selected by the Railway Company, and the land was thereby placed in reservation, so that the selection by the Railway Company was void for all purposes and conferred no rights whatever upon the Company, although such reservation was not a barrier to subsequent settlement under the homestead law.

It will be apparent that the first question to be determined is whether there was a *valid* application for survey under the act of 1894, which became effective *before* selection of the land by the Railway Company on July 23, 1901. If this question can be resolved in appellee's favor,

it will then become necessary to determine whether such application for survey resulted in an absolute reservation or withdrawal of the land, so that no rights whatever attached under the Railway Company's selection, notwithstanding the fact that the State thereafter failed to make a valid selection of the land and could not and did not acquire any rights therein.

Both these questions have been determined adversely to appellee's theory by numerous decisions of the Land Department, as well as by the District Court in the case at bar. After some early vacillation the Department has consistently held, first, that the application for survey with which we are here concerned was invalid and never became effective; and second, that even a valid application for survey under the act of 1891 merely creates a preference right in favor of the State, and that a subsequent selection under an act like that of March 2, 1899, initiates a claim which is effective against all the world unless the State itself thereafter succeeds in appropriating the land under the provisions of its granting act—which it here failed to do. And appellee can prevail only if this Court holds the decisions of the Department and the District Court erroneous in law as to *both* these issues. If either was correctly decided her case falls.

1.

The facts with respect to the application for survey are somewhat complicated, and there are some inconsistencies in the earlier decisions of the Department which tend to confusion. It is therefore essential to a proper understanding of the case, not only that the facts be attentively

considered, but also that the chronological relation of the various steps taken be kept clearly in mind. And we believe that it will conduce to a better understanding of the situation if we preface our outline of the steps taken under the act of 1894 with a brief analysis of the act itself.

This act was passed in aid of land grants previously made by Congress to Idaho and other western states. An important feature of these granting acts was the so-called quantity and indemnity grants, requiring affirmative selection by the States; and this right of selection could only be exercised after survey. Complaint was made that the States were usually worsted in the race to the Land Office, and Congress thereupon passed the act of March 3, 1893, which gave a preference right of selection for sixty days after filing of the township plat of survey. This, however, was said to be insufficient, because it gave no protection against claims attaching before survey under laws permitting selection of unsurveyed lands and the initiation of homestead claims by settlement before survey; and the States demanded legislation under which some preference could be secured against such claims. In response to this demand Congress passed the act of 1894.

In construing that act its object and purpose must, under familiar rules, be kept always in mind. This was no more than to give the States a preference right of selection of designated unsurveyed lands, as against claims initiated after such designation is made. It was no part of the purpose of the act to discourage homestead settlements on unsurveyed lands, nor to limit or destroy the right of appropriation of such unsurveyed lands under other acts. Indeed, the act of March 2, 1899, with which we are here concerned, and the acts of June 4, 1897, and

July 1st, 1898, were all passed long after the act of August 18, 1894; and by each of those acts the selection of unsurveyed lands is expressly authorized.

So while it may be that by the literal terms of the act of 1894, the result of a valid application for survey is to "reserve" or "withdraw" the land designated in the application; nevertheless the true construction of the act, as settled by repeated decisions of the Land Department, is that the application for survey does *not* effect a "reservation" or "withdrawal" of the lands, in the sense in which those words are ordinarily used in land law terminology, but merely secures to the State a preference right of selection. The land is not *segregated* by the application for survey (as it is by an ordinary entry or selection) so as to constitute a bar to the initiation of subsequent claims. Any claim thereafter initiated is, of course, subject to the preference right of the state, and will be defeated by a valid selection thereafter made by the State within the preference period. But if the State does not select the particular land, or if an attempted selection by the State is rejected as unauthorized or illegal (as in this case), the individual claimant is accorded priority over all other claims subsequently asserted. In one case, and one only,—the Departmental decision of March 20, 1911 (39 L. D. 583)—is a contrary view expressed. But that case stands alone and unsupported; it is inconsistent with all other prior and subsequent Departmental decisions on the subject (of which there are many) and it has since been expressly overruled and repudiated.

Another thing to be kept in mind in considering the provisions of the act of 1894, and the steps taken under it in the present instance, is the well-established rule that

the preference or privilege conferred by the act is in derogation of the common right to appropriate public land under other laws; and hence that it must be strictly construed and strict performance required of those steps upon which its operation is conditioned. See authorities hereinafter cited.

Now the terms of the act of 1894 require the following conditions to be performed in order that the State may acquire a preference:

(a) The Governor shall file with *the Commissioner of the General Land office* a written application for the survey of the designated township or townships.

(b) Published notice of such application, sufficient to "give notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State" for the prescribed period, shall be given by the Governor within thirty days after the date of the *filling of the application*.

(c) Such notice shall be published in a newspaper of general circulation in the vicinity of the lands designated, "which publication *shall be continued for thirty days from the first publication*."

(d) The Commissioner of the General Land Office shall immediately give notice of the reservation of the designated township, or townships, to the local Land Office in the district in which the land is situated.

(e) The Commissioner shall immediately give notice of the application to the Surveyor General of the State, who shall thereupon cause the required survey to be made.

Notwithstanding some uncertainty in the earlier cases, it is now the settled law of the Department that strict compliance with these provisions is a condition precedent to the attaching of the preference right of the State; and also that the act contemplates, by necessary implication, the recognition and allowance of the application for survey by the Commissioner of the General Land Office, so that in the absence of such recognition and allowance the preference provisions of the act are inoperative.

In July, 1901, the Governor of Idaho undertook to apply under the act of August 18, 1894, for the survey of eighteen townships in northern Idaho, including township 43, range 4, with which we are here concerned. He signed a form of application which bore date July 5th, 1901, and which was addressed to *the Surveyor General for Idaho* and the Commissioner of the General Land Office. This paper was filed, not with the Commissioner of the General Land Office as required by the act of 1894, but in the office of the Surveyor General at Boise. It was so filed, not on the day of its date, but on July 8, 1901. On or shortly after July 10, 1901, it was transmitted by the Surveyor General, of his own initiative, to the Commissioner of the General Land Office, and was received in the General Land Office on July 15, 1901. It is now authoritatively settled that the application was not effective for any purpose until the date of its receipt by the Commissioner; and it is only by a stretch of construction favorable to the State (and consequently to the appellee) that it can be deemed to have been filed with the Commissioner, within the meaning of the act, on the latter date.

In assumed compliance with the provisions of the act of 1894 requiring published notice of the application for sur-

vey, the Governor issued a notice dated July 6, 1901,—two days before the delivery of the application to the Surveyor General and nine days before the date when the application was filed with the Commissioner and first became effective for any purpose. This notice, speaking from its date, declared that the Governor *had theretofore applied* under the act of 1894 for the survey of the townships named; and that those townships were reserved from other appropriation for a period to extend *from the time of such application* until the expiration of sixty days after the filing of the township plat of survey. As a matter of fact the Governor had *not* applied at the date of the notice, or at the time it was first published; and the notice was therefore false and misleading in a most essential particular. The authorities to which we shall refer demonstrate that it is fatal to a notice of this character if the date when the preference or reservation takes effect, as well as the period for which it runs, is incorrectly stated.

The notice was published in six weekly issues of an Idaho newspaper, commencing on July 10, 1901 and ending August 14, 1901. The act of 1894 provides that publication of the required notice shall commence "within thirty days *from* the filing of the application"; and that such publication "shall be continued for thirty days *from* the first publication." The word "*from*" as here used must be held synonymous with "*after*." As the notice was first published on July 10, five days *before* the filing of the application, that publication of the notice, at least, was ineffectual and must be disregarded. The construction most favorable to the State (and the appellee) is that the first publication made after the application was filed, viz.: the publication of July 17th, was the first effectual

publication of the notice. And as it was last published on August 14th, the requirement of the statute that the publication "shall continue for thirty days from the date of the first publication" was not complied with.

The application for survey embraced eighteen townships, containing more than 403,000 acres of land; and the State had theretofore applied for the survey of a large number of other townships throughout the State, which had not yet been surveyed and from which no selections had been made. At that time the quantity grants to the State were largely satisfied; and as this was long before the establishment of the principal forest reserves, and the great losses which the State afterwards claimed to have suffered through the inclusion of "school sections" within such reserves were then unknown and unforeseen, a relatively small acreage was required to satisfy the State grants under conditions then existing. And the area of available lands in townships for the survey of which the State had theretofore made application, to say nothing of the townships named in the application of July 1901, was enormously in excess of any apparent requirements.

Passing upon the application for survey in the light of these facts, the Commissioner, on July 19, 1901, held that the application in question was excessive and improvident, and declined to recognize or allow it. Due notice of this action was given to representatives of the State, but no appeal from the decision was taken. It has since been established that the action of the Commissioner was within the authority vested in him by law; that his order was subject to appeal under the rules and practice of the Land Department, and if erroneous, could have been corrected on appeal; and that, whether erroneous or not, the order is-

came final and conclusive upon the lapse of the prescribed period without appeal.

The application for survey having been rejected by the Commissioner, no notice of such application was given to the local land officers and no notation or other record of the application or of any reservation of the townships named therein was entered upon the records of the local offices as required by the affirmative provisions of the act of 1894; nor was the notice of the application given by the Commissioner to the Surveyor General as required by that act. Neither was any action taken on behalf of the State to have the fact of the application or its claim of preference or reservation noted on the records of the local land offices. Therefore, when the Railway Company selected the land on July 23, 1901, and for many years thereafter, the records in the Coeur d'Alene Land Office (and the records of the General Land Office as well) contained no showing of this application or of the State's preference claim; but on the contrary it appeared from those records that the land was free from claim or appropriation and open to selection by the Railway Company.

In January, 1905, as a result of some subsequent efforts on the part of the State and a supplementary application for survey of the townships in question, followed by a deposit by the State to cover the cost of survey, the General Land Office was persuaded to accord a qualified recognition to the claim of the State as to certain of the townships embraced in the application of July, 1901. And on January 20, 1905, the Commissioner addressed a letter to the Register and Receiver of the Coeur d'Alene Land Office directing those officers to give notice by publication of the reservation of the specified townships.

*"from and after * * * January 18, 1905, and for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plats of survey of the designated townships in your office * * * during which period the State authorities may select any of the lands situated in said townships, which are not embraced in any adverse claim."* (Tr. p 132.)

The first entry ever made in the Coeur d'Alene Land Office which in any way recognized, or was based upon, this application for survey, was the entry made in obedience to the Commissioner's letter of January 20, 1905. And that entry, by its express terms, indicated that the right of the State dated from January 18, 1905, and was subordinate to claims initiated prior to that date. It was at one time assumed, that this action gave the State a preference right dating from January 18, 1905; but subsequently, upon full consideration, the Department finally held (and this position has been consistently adhered to ever since) that the application for survey was ineffective for any purpose, and that the State acquired no preference right whatever thereunder.

On July 30, 1909, after the filing of the township plat of survey in the local land office, application was made in the name of the State of Idaho to select this and other land in the township, under the indemnity provisions of the State school land grants, in lieu of certain designated sections 16 and 36 alleged to have been lost to the State by reason of their inclusion in forest reserves. The proffered selections were rejected, and the rejection affirmed by the Secretary on appeal. It was held that the application for survey made by the State under the act of August 18,

1894, never became effective and that the State acquired no preference right thereunder. And it was further held that even should it be conceded that the State had a preference right of selection, nevertheless under the constitution and laws of Idaho, as construed by the Supreme Court of that State, the representatives of the State were without authority to make selections in lieu of the bases tendered; that an act of the legislature of Idaho passed February 8, 1911, had no retroactive effect; and that the proffered applications to select were in and of themselves unauthorized and void.

It was also held that neither the application for survey, nor the attempt by the officers of the State to select the land in July, 1909, in any manner prejudiced or affected the validity of the Railway Company's selection of July 23, 1901; that that selection was in all respects regular and valid, and entitled the Company to the land; and that as Delany's settlement was made two years after selection by the Railway Company, he acquired no rights thereunder. As already stated, the State acquiesced in the decision and is out of the case.

2.

In disposing of this question the learned trial judge said (Tr. pages 138-145) :

"The defendant Railway Company filed its selection lists, under the exchange provision of the act of March 2, 1899, (30 Stat. 993), on July 23, 1901, about a year before settlement by any person. A few days prior to such selection, however, the State of Idaho had made application for the survey of a large body of land, including that in controversy, under the pro-

visions of the act of August 18, 1894, (28 Stat. 373, 394), and the question is, whether the proceedings taken by the State prior to July 23rd operated so far to withdraw the land from the public domain that it could not be selected by the Railroad Company either absolutely or conditionally. By the Land Department the question was answered in the negative, first, because there was no valid, effective application for survey before the Railroad Company filed its selection list, and, second, because, by the settled construction of the Department, lands, even though embraced in a valid application for survey by the State, may be selected by a Railroad Company subject to the State's preference right. Such preference right the State has here failed to assert, and no claim upon its part is presently involved.

"Under the act of 1894 it is provided that (a) the application for survey must be made by the Governor of the State to the 'Commissioner of the General Land Office,' (b) notice of the withdrawal or reservation of the land is to be immediately given by the Commissioner to the Surveyor General of the State, and to the district Land Office, and, (c), within thirty days from the filing of the application, the Governor of the State must give notice of the application by publication for thirty days in a local newspaper. The lands so to be surveyed 'shall be reserved, upon the filing of the application for survey, from any adverse appropriation, by settlement or otherwise, except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of filing the township plat' in the proper district Land Office.

"On July 8, 1901, the Governor of Idaho filed with the Surveyor General an application bearing date July 5th, for the survey of eighteen townships, includ-

ing township 43 North, Range 4 East, and by the Surveyor General the application was sent to the Commissioner of the General Land Office, by whom it was received July 15th. It is clear, I think, that the application did not become effective for any purpose until it reached the General Land Office, and such is the holding of the Land Department. A notice bearing date July 6th was published in six weekly issues of a local paper, the first publication being on July 10th, and the last on August 14th. Assuming that the first effective publication was that of July 17th, two days after the receipt of the application by the Commissioner, I am inclined to the view that sufficient notice was given to meet the requirements of the law; the publication was made in every issue of the paper published during the thirty-day period following the filing of the application.

"As already stated, the application was for the survey of eighteen townships, or approximately 403,000 acres, and other applications of a similar character were pending. Taking cognizance of the vast area thus applied for, and of the limited right of selection remaining in the State, the Commissioner, on July 19, 1901, considered the application in question to be excessive, and declined to recognize it. *No appeal having been taken by the State from his ruling, the same became final and binding,* provided, of course, that the Commissioner was acting within his jurisdiction. The application having been declined, *no notice of its filing was given to the district Land Office, and no notation was ever made upon the township plats in that office or upon any of its records,* of the reservation or withdrawal of the land. Such was the status of the application and of the Land Office records, when, upon July 23rd, the Railroad Company filed its selection lists. Later, in January, 1905, it seems that as a result of certain supplementary pro-

ceedings, the General Land Office recognized the preference right of the State, *but only from January 18, 1905, not from July 15th, 1901*, as appears from a letter of date January 20, 1905, from the Commissioner to the Register and Receiver of the district Land Office, by which the latter officers were directed to give notice of the reservation of certain townships, including 43-4, 'from and after * * * January 18, 1905, and for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plats of survey of the designated townships in your office, * * * during which time the State authorities may select any of the lands situated in said township, which are not embraced in any adverse claim.'

"Upon the question of the power of the Commissioner to reject an application for survey, the act of 1894 is equivocal, and the rulings of the Land Department have not been entirely uniform, the later decisions however, being in support of such jurisdiction. *N. P. R. R. Co. v. Idaho*, 39 L. D. 583; *Thorpe v. Idaho*, 43 L. D. 168; *State v. Roberson*, 44 L. D. 448. (Also the decision here involved.)

"The language of the act, it is thought, is more readily susceptible to the construction adopted in the first decision, but in practical administration such a meaning gives rise to the most serious difficulties. In that view, a State with an unsatisfied grant of a thousand acres could, by the very simple and inexpensive process of filing an application in the General Land Office and publishing a notice for thirty days, withdraw from entry the entire area of public land, however great, within the State. Is it possible that Congress contemplated or intended such a result? By the terms of the act, the application for survey must be made only 'with a view to satisfying the public land grants * * * to the extent of the full quantity

of the land called for by the granting acts. Is not the right, therefore, to be regarded as commensurate with the needs of the State? I am not suggesting that the amount applied for cannot in any case properly exceed the unsatisfied grant. The application must be for an entire township, whereas a smaller amount might be sufficient to satisfy the grant. But giving consideration to the extent of the grant and the character of the lands and the interest of the Government in having its public lands disposed of and not needlessly withdrawn from entry, it is thought that the area to be surveyed must bear some reasonable relation to the area the State has the right to select. Such being the extent of the right or privilege conferred upon the State, it follows that an application for an excessive survey, being unauthorized, is ineffective, and it is for the officers of the Land Department, charged as they are, with the sale and disposition of public lands, to determine whether in any given case the application is within the law. In any other view I am unable to see how the interest of the Government can be protected. If therefore in fact the application under consideration was found to be excessive, the Commissioner of the General Land Office did not exceed his jurisdiction in declining to recognize it, and in refusing to take any steps to carry it into effect.

"It is further contended by the plaintiff that, defective though it may have been, the application served to withdraw the land from the operation of the act of 1899, reference being had to the familiar principle that the segregative effect of an entry or other selection is not necessarily dependent upon its inherent validity. *Holt v. Murphy*, 207 U. S. 407; *McMichael v. Murphy*, 197 U. S. 304; *Hodges v. Colecord*, 193 U. S. 192; *Sturr v. Beck*, 133 U. S. 541; *Edith G. Halley*, 40 L. D. 393. If, however, as is held, the Com-

missioner of the General Land Office had the power to reject it, *the application never became operative for any purpose.* To have segregative effect, an invalid application or entry must in some way be accepted or recognized by the Land Department; having been allowed, even though erroneously, it is binding upon and segregates the land. But here at the very outset there was a declination to recognize the application. If, however, we assume that the application was valid, and that the Commissioner was without power to reject it, it must be borne in mind that it constituted no offer to enter the land, but amounted only to a request to have it surveyed. *The land was not entered or selected; the State made no specified claim,* and it might ultimately decide not to select a single subdivision. True, the terms 'reserved' and 'withdrawn' are used in the act, but when we consider its intent and purpose, clearly the only effect contemplated was to confer upon the State a preference right to select, at its option. *By the filing of the application the State initiated no claim or right to any portion of the land.* As has been very properly held by the Land Department, I think, the position of the State is closely analogous to that of a successful contestant after the cancellation of record of the contested entry. The land embraced in such entry is, as a result of the cancellation, fully restored to the public domain, and is no longer segregated or reserved, but the contestant possesses the preference right of entry. Accordingly, following the practice in relation to such contested entries, the Department holds that the pendency of such preference right does not operate to prevent the filing of other applications, subject to such preference right. *Stewart v. Peterson*, 28 L. D. 515; *Cronan v. West*, 34 L. D. 301; *State v. N. P. R. R. Co.*, 37 L. D. 70; *Swanson v. N. P. R. R. Co.*, 37 L. D. 74; *Delany v. N. P. R. R. Co.*, unreport-

ed, decision November 18, 1915). No good reason is apparent for holding such a practice illegal.

"Our attention is directed to the language of the act of March 2, 1899, creating and defining the limits of the right of the Railroad Company to select, wherein it is authorized 'to select, in exchange for lands relinquished by it, an equal quantity of non-mineral public lands * * * not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection,' etc. But this language does not alter the question. Neither can a citizen rightfully settle upon or enter land unless it be public land, not reserved, and to which no private rights have attached or been initiated, etc. And yet the plaintiff asserts the right of her predecessor to settle upon and claim the land in controversy long after the state filed its application, and after the Railroad Company filed its selection. The right of the Railroad Company to select is quite as broad as the right of the citizen to 'homestead.' As already suggested, by its application for survey, the State initiated no claim to this land; it was merely given a certain length of time to determine whether it would make such claim, and while the term 'reserved' is used, plainly there is no reservation in the ordinary sense, as for some Governmental purpose. The moment the preferential period in favor of the State expires, the lands may be entered by any qualified person, the same as in the case of other public lands.

"In view of these considerations, it is thought that the Land Department acted upon a proper construction of the law, and accordingly the plaintiff's bill will have to be dismissed, and such will be the order."

The question at issue is so ably and exhaustively dealt with by the Court below, that we might well submit the

case upon his discussion of it, without further argument. But because of the importance of the question, it seems best to supplement the opinion with some of the reasoning and authorities which were submitted to the trial court and which, presumably, influenced the decision.

3.

Now, of course, if there was no valid application for survey, there was no "reservation" or "withdrawal" of the land, under any possible construction of the act of 1894. It is only upon the theory that the land was reserved or withdrawn as the result of an application for survey, effective before selection by the Railway Company on July 23, 1901, that the validity of that selection can be questioned. This is plain enough on principle and from the language of the act itself, but it is also settled by a long and unbroken line of departmental decisions. Whatever doubt or uncertainty may have for a time existed with respect to the construction and effect of some of the provisions of the act of 1894, there was never any doubt or uncertainty as to this proposition.

William E. Cullen, 32 L. D. 240.

McFarland v. State of Idaho, 32 L. D. 107.

Kay v. State of Montana, 34 L. D. 139.

State of Washington, 37 L. D. 2.

State of Idaho v. Northern Pacific, 42 L. D. 118.

Thorpe v. State of Idaho, 43 L. D. 168.

It is also well settled that the steps which the act requires to be taken on behalf of the State are conditions

precedent, and that strict compliance with such provisions is essential.

In the case of *William E. Cullen*, 32 L. D. 240, the Department said:

"The law grants to the State a special privilege in derogation of the common right of others to appropriate the public domain under the general land laws, and must be strictly construed and the State held to strict compliance."

This principle has been reaffirmed and applied in a number of cases, including *State of Idaho v. Northern Pacific*, 42 L. D. 118, where the Secretary quoted the following language from the opinion of the late Justice Lurton, then Circuit Judge, in *Campbellsville Lumber Co. v. Hubbert*, 112 Fed. 718, 724, (a decision in which Mr. Justice Day, then Circuit Judge, concurred):

"An attentive consideration of the principle of statutory construction here involved leads us to conclude that when a statute gives a new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the act should be strictly construed; and the validity of all acts done under the authority of such an act will depend upon a compliance with its terms. In respect to such acts the steps pointed out for the acquisition, preservation and enforcement of the remedies provided should be construed as mandatory, rather than optional. (Citing *Sutherland on Statutory Construction*, Sections 454 and 458 and other authorities.)"

In many of the cases cited above the question turned upon the sufficiency of the notice and publication required by the act of 1891; and in all those cases it is held that a

proper notice, and publication thereof in strict accordance with the terms of the statute, are absolutely essential. The learned trial judge was inclined to think that the publication of the notice involved in this case might be held sufficient, notwithstanding the irregularities pointed out; and he does not appear to have considered the defect in the notice itself. Of course, in the view which the Department and the District Court have taken of the matter (and which we ourselves take) it is quite immaterial whether the notice and publication were good or bad. And we shall spend no more time on the point, save to assert our confident belief that the notice and publication were fatally defective, and the application for survey ineffectual for this reason, even if it could be sustained as against other objections; submitting the question on the authorities cited above and those which follow:

Randout v. First National Bank, 37 Ill. App. 296.

Metropolitan Bank v. Monckhead, 38 N. J. Eq. 493.

Early v. Dow, 16 How. 610.

State v. Tucker, 32 Mo. App. 620.

State v. Cherry County, 58 Neb. 734, 79 N. W. 825.

Finlayson v. Peterson, 5 N. D. 787, 67 N. W. 953.

4.

In the courts below appellee's counsel made no real attempt to uphold the validity of the application for survey. Their position appeared to be that as the validity of the application was for a time assumed by the Department, it was sufficient to defeat the Railway Company's selection,

notwithstanding the earlier rulings recognizing the application were erroneous in law and fact and have since been recalled and vacated. This is a question which will be discussed hereafter.

Little need be added to what the trial court has said respecting the application for survey. It is apparent, as the court below points out, that (aside from all other considerations) the action of the Department in rejecting and disallowing the application was sufficient to prevent the attaching of any rights thereunder, unless the Department was wholly without jurisdiction to pass upon and reject the application as improvident and excessive, in any conceivable state of facts. For if there was jurisdiction, the ruling of the Commissioner, involving (as it did) a determination of fact and being acquiesced in by the State without appeal, was final. It is not for the court to say, at this time, whether the Commissioner was right in holding that the particular application was excessive in the light of the facts then before the Department. The only theory upon which that action could now be reviewed and overridden is that the act of 1894 gave the State an absolute right to tie up every acre in every unsurveyed township in the State, although a single quarter section would have been sufficient to satisfy completely its unfilled grants.

Confusion may result unless attentive consideration is given to the later decisions of the Department dealing with the question. For while it is now well settled that this particular application for survey was inoperative and ineffectual, and neither conferred any right on the state nor constituted an obstacle to claims initiated after it was made, nevertheless in some of the earlier decisions a com-

trary view was taken. The rulings in favor of the State in the earlier cases seem to have been due partly to failure to give due consideration to the facts surrounding the application for survey, and partly to an erroneous view of the functions and authority of the Commissioner in proceedings under the act of 1894. See *Thorpe v. State of Idaho*, 35 L. D. 640, 36 L. D. 479, 42 L. D. 15; *Williams v. State of Idaho*, 36 L. D. 20, and *Northern Pacific v. State of Idaho*, 39 L. D. 583. But on further consideration of the same cases, those decisions were reversed and revoked, and it was expressly held that the application for survey never became effective, and that the State never acquired any preference right thereunder; much less that a reservation or withdrawal of the lands resulted. *Thorpe v. State of Idaho*, 43 L. D. 168. And this conclusion has consistently been followed in all subsequent decisions on the subject, some of which are cited below:

State of Idaho v. O'Donnell, 44 L. D. 345.

State of Idaho v. Robertson, 44 L. D. 448.

Northern Pacific v. State of Idaho, 45 L. D. 37.

McDonald v. Northern Pacific, Secretary's decision of October 30, 1914, unreported, Record, pp. 123-135.

Delang v. Northern Pacific, Secretary's decision of November 18, 1915, unreported, Record, pp. 119-121.

State of Idaho v. Northern Pacific, Commissioner's decision of July 16, 1914, unreported, Record, pp. 86-97.

And see: *State of Idaho v. Northern Pacific*, 42 L. D. 518.

It is to be borne in mind that the latest decision in the Thorpe case (43 L. D. 168) represents the final action of the Department in the very cases in which contrary views are found expressed—so that the earlier decisions reported under the title of *Thorpe v. State of Idaho* and *Williams v. State of Idaho* must be regarded as mere interlocutory rulings which were rejected on final hearing and which therefore have no value as precedents.

It may now be regarded as established, so far as the Department has power to settle such a question, that the 1901 application for survey was inoperative, at least against claims initiated before January, 1905, for three independently sufficient reasons:

(1) Because the application for survey was rejected and disallowed by the Commissioner, whose decision became final for want of appeal and could not afterwards be questioned, whether right or wrong;

(2) Because when the Commissioner was finally persuaded, in January, 1905, to accord a qualified recognition to the claim of the State, the reservation and preference right then allowed was expressly made to date from January 18, 1905, and it was so noted on the records of the Land Department and in the Coeur d'Alene Land Office, and the State acquiesced therein;

(3) Because of failure to make substantial compliance with the requirements of the act of 1894, which are made conditions precedent to the attaching of the privilege conferred by the act, including the very important requirement for notation on the records of the Local Land Office of the fact that an application for survey had been made and that the State

claimed a preference right thereunder—a provision essential for the protection of the public and intending claimants as well as for the information of the local land officers.

It should be remembered that at the time the Railway Company filed its selection list on July 23, 1901, eight days after the application for survey was filed with the Commissioner of the General Land Office in Washington, that application had been rejected and disallowed by the Commissioner; the Company was without notice or knowledge that such an application had been made; the records of the Coeur d'Alene Land Office showed the land to be free from any sort of claim and open to selection by the Company (and did for three and a half years thereafter); the Company's selection was accepted and allowed by the local officers; and the representatives of the State had acquiesced in the rejection of the application for survey and for some years thereafter took no steps to assert or give notice of its alleged prior claim.

5.

Laying Departmental rulings out of sight for a moment, and looking at the question from a practical standpoint, and in the light of the language and intent of the statute, it is rather startling to consider how far the Court must travel to come to a decision overturning the patent in this case and awarding the land to appellee on the strength of Delany's rejected homestead application. It must be held that the attempted application for survey made by

the State under the act of 1894 was valid and operative, notwithstanding its disallowance by the Commissioner by an order from which no appeal was taken; notwithstanding the serious if not fatal, defects in the matter of notice and publication; notwithstanding the fact that no notation of the application for the State's claim of preference right thereunder was made upon the records of the Land Department or the local land office until 1905; notwithstanding the affirmative ruling in 1905 by which the period reserved for the exercise of the State's preference right was made to date "*from and after January 18, 1905,*" and the acquiescence by the State in that ruling. And having sustained the application, it must be held further that by virtue thereof the lands were withdrawn and placed in reservation, so as to bar other forms of appropriation; although this is foreign to the purpose which the act was intended to serve; unnecessary to the protection of the privilege conferred upon the State; contrary to the established practice of the Department and a long line of Departmental decisions; and inconsistent with and subversive of the spirit and purposes of the general land laws. And this is a case where the State's attempted selection of the land was rightly rejected by the Department as unauthorized and void; where the State itself has acquiesced in that decision and makes no claim to the land; where the issue now rests between a party claiming under patent of the Government based upon a proper selection made on July 23, 1901, and a party claiming under an unsuccessful homestead application based upon an alleged settlement two years later; and where the settlement of the adverse claimant was just as much in conflict with the reservation

and withdrawal, if any such existed, as was the prior selection.

Suppose it were conceded that a valid application for survey would effect a reservation or withdrawal of the land and segregate it against other claims; and suppose it be also conceded that, as held in the earlier cases, it was beyond the power of the Commissioner to reject the application for survey to the prejudice of the rights of the State, and that there was a sufficient compliance with the requirements of the act of 1894 to secure to the State a preference right of selection. It is nevertheless a very different thing to hold, in a contest between individual claimants in which the State has no interest, that the lands were put in reservation and segregated against other appropriation by an application for survey which the Land Department rejected and refused to recognize, and of which no record was made in the local land office until years after selection by the Railway Company.

6.

Let us now consider, as a question of law, what the rights of appellee would be on the assumption that the application for survey should be held valid and operative. Appellee's present contention was disposed of by the Secretary of the Interior in his decision of November 18, 1915, (Tr. page 120) in the following language:

"In his appeal Delany urged that the selection did not defeat his settlement because it was erroneously received and filed in the local office, and is inoperative, for the reason that an application had been made

by the State of Idaho prior to the date on which the list was filed, for the survey of the township in which the land is located under the act of August 18, 1894, and was pending at the time the (selection) list was filed, and, therefore, prevented the acceptance and filing of the list. This contention is contrary to the holding of this Department in the closely kindred case of *Swanson v. Northern Pacific Ry. Co.*, 37 L. D. 74. The decision in that case is in harmony with the established practice of the Land Department, which sanctions the receipt and filing of applications for lands while they are subject only to mere preferred rights and appropriations, (*Stewart v. Peterson*, 28 L. D. 515-519)."

Swanson v. Northern Pacific, 37 L. D. 74, cited by the Secretary in the Delany case, was decided about twelve years ago. In the Swanson case the precise point here at issue, arising upon facts precisely similar, was squarely presented to and decided by the Department. In that case, as in this, the Railway Company selected the land under the act of March 2, 1899, at a date subsequent to application for survey by the State, which was assumed to be valid. After selection by the Company, but prior to survey, Swanson made a homestead settlement, and on his behalf it was asserted that the application for survey made by the State under the act of 1894 operated to withdraw or reserve the land so as to prevent selection thereof by the Railway Company under the act of 1899. As Swanson remained in settlement on the land at the time of survey, and at the time when the State's preference right expired, his entry must have been allowed unless the Company's selection was held valid from its inception. The Department held the Company entitled to the land, saying:

"It is contended further that the application of the State of Idaho for a survey of the township of which the tracts applied for are a part, made prior to the selection by the Railway Company, operated to reserve the land from other disposition until after the expiration of three months from the filing of the approved plat of survey, and as his settlement was made and his homestead application presented prior to the expiration of said period, his entry should have been allowed. *The effect of the application of the State was not, however, to place the land in reservation, but only to secure to the State a preferred right to select the lands covered by its application. It did not operate to prevent the filing of other applications for the land subject to the superior right of the State.* In this case the State made no attempt to exercise its preferred right of selection, and there was therefore no bar to the consideration of other claims the same though such right had never existed."

Again, in *State of Idaho v. Northern Pacific*, 37 L. D. 70, the same question arose; and it was there said:

"It is contended that the Company was not entitled to select under the act of March 2, 1899, supra, * * * lands for the survey of which application was made by the State. * * * The objection that the lands were not subject to selection by the Company because embraced in the State's application for survey, even if well taken, could not be interposed as to the tracts applied for by Hooper. * * * As to Perkins, the objection, if valid, would only be material in so far as it relieved him from the necessity of proving his prior settlement. *The application of the State for survey did not, however, operate as an absolute withdrawal of the land described therein, but only subjected such lands to the preferred right of the State*

to select them within sixty days from the time of the filing of the approved plats of survey."

More recent cases in which this question has been considered and decided by the Department are *Northern Pacific v. State of Idaho*, 45 L. D. 37, and *Verdine R. Hall*, 45 L. D. 574. In both cases it is held (as it was held twelve years ago in the Swanson case) that the effect of the act of 1894 is merely to confer a preference right and that it does not place the land in reservation. These cases represent the last word of the Department on the subject; and because of this fact, and the line reasoning adopted, are precisely in point on the present question.

In the leading case of *Heirs of Irwin v. State of Idaho*, 38 L. D. 219, it was said:

"In disposing of the State's claim it is sufficient to say that the question presented, or questions entirely similar, have been repeatedly determined by this Department and the courts. The preference right awarded the State by the act of 1894 seems to be in no way superior to the preference right awarded the successful contestant by the act of May 14, 1880, supra.

* * * *The act of 1894 merely gives the State a preference right of selection over all other applicants, and in thus inviting the State to apply for the survey of lands whereby a preference right over others may be secured, the Government in no way commits itself or agrees to withhold the lands from any disposition which it may find necessary to make of the same."*

State of Utah, 33 L. D. 358, is another much cited case; and it was there said:

"Waiving the question as to whether the record shows sufficient compliance with the act of 1894 on

the part of the State in the matter of the publication of notice, it is clear that the only right intended to be granted the State was that of a preference over other intending claimants under the public land laws, to make selections of such lands as it desired and needed, within the period of sixty days after the filing of the township plats of survey, and that under the State's application no such claim attached as prevented the appropriation of the lands by the United States under an act of Congress until formal selection thereof had been made by the State."

In the Attorney General's opinion of September 15, 1909, (38 L. D. 224), which was in part the basis for the decision in the Irwin case, full consideration was given to the doctrine previously declared by the Department that an application for survey under the act of 1894 does not result in the segregation or reservation of the land, but operates merely to give the State a preference right of selection; and the Attorney General concluded that this construction of the statute is not only reasonable, but plainly right; and that it should be consistently adhered to by the Department. In discussing the State of Utah case cited above, the Attorney General says:

"This decision was on the ground that the sole claim of the State * * * rested upon the application of the Governor for a survey of the land, whereas the only right intended to be conferred upon the State by the act of August 18, 1894, was simply one of preference over other intending claimants to the unsurveyed public lands."

In *Cronan v. West*, 34 L. D. 301, it was said:

"The preference right given by the act of March 3, 1893, is analogous to the preference right of a suc-

cessful contestant and does not segregate the land against other applications; and they are entitled to be received, subject to the State's right, and if that is not exercised, take effect from their presentation."

See also: *State of Idaho v. Northern Pacific*, 39 L. D. 343, and *Northern Pacific v. Mann*, 33 L. D. 621.

7.

It is a cardinal rule of statutory construction that the intent of Congress is to be sought, not merely in the bare words of its enactments, but also in the light of the evident aims and objects of the act considered; and that the interpretation to be placed upon terms used in the act shall be that which will carry out the purpose Congress sought to effect, without unnecessarily disturbing settled conditions and established rules of law and policy, the disturbance of which is really foreign to the purpose of the legislation and unnecessary to the full accomplishment of the object of the act. This is especially true where the contrary interpretation works out a result more or less inconsistent with the policy of other congressional enactments and with the public interest. In such a case the courts will not hesitate to restrict the broad language of a statute to a meaning which, while it carries out fully the manifest intent of Congress, does not go beyond the legislative purpose and work results which the law-making power evidently did not contemplate or desire.

"It is indispensable to a correct understanding of a statute to inquire first what is the subject of it; what

object is intended to be accomplished by it. When the subject-matter is once clearly ascertained, and its general intent, a key is found to all its intricacies; general words may be restrained to it, and those of a narrower import may be expanded to embrace that intent. * * * General words may be cut down when a certain application of them would antagonize a settled policy of the State. * * * Mr. Justice Field said: 'Instances without number exist where the meaning of words in a statute has been enlarged or restricted, and qualified to carry out the intention of the legislature.' * * * The intention of an act will prevail over the literal sense of its terms. * * * The true meaning of any clause or provision is that which best accords with the subject and general purpose of the act."

Sutherland Stat. Constr. (1st Ed.), Secs. 218, 219.

"The statute * * * must be examined in the light of the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."

Chief Justice Fuller, in *United States v. American Bell Telephone Co.*, 159 U. S. 548, 549.

"It is undoubtedly the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend

to cases which the legislature never designed to embrace in it."

Chief Justice Taney, in *Brewer v. Blougher*, 11 Pet. 197, 198.

"If a literal interpretation of any part of it (a statute) would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment."

Mr. Justice Davis, in *Heydenfeldt v. Dauncy Gold Min. Co.*, 93 U. S. 638; quoted with approval in *Hawaii v. Mankichi*, 190 U. S. 197, 213.

"But the subtle significance of words and the niceties of verbal distinction furnish no safe guide for construing the act of Congress. On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeating the wrong which it was its purpose to frustrate."

Chief Justice White, in *Rhodes v. Iowa*, 170 U. S. 412, 422.

"If it be true that it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so, in order to carry out the legislative intention."

Mr. Justice Davis, in *Reiche v. Smythe*, 13 Wall. 162.

"It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

Mr. Justice Brewer, in *Holy Trinity Church v. United States*, 143 U. S. 457, 472.

It may be that the act of August 18, 1894, if read literally and without regard to the evident object of Congress and the general policy of legislation with respect to the public domain, might be thought to provide that the application for survey should operate to withdraw or reserve the lands absolutely from any appropriation before survey. But the mere words of the act cannot be considered apart from its plain intent and purpose. And this was not what Congress intended. The object of the act was to enable the State to secure for itself a preference right of selection. The State is not authorized to make selections before survey; and it was claimed that the most desirable lands were being taken up while still unsurveyed, so that when the time came at which the State might exercise its right to select in satisfaction of its land grants, the valuable lands would all be appropriated. Therefore Congress was induced to make provision which would permit the State, by taking the prescribed steps, to secure a first

right of selection which should be superior to claims initiated after those steps were taken.

In order that the object of the enactment may be fully attained, and the State given the fullest possible protection, it is only necessary to hold (as the Department has heretofore held) that compliance with the act gives to the State a preference right of selection superior to all claims initiated after the application for survey. It is not necessary for the protection of the State or to effectuate the objects of the enactment to hold that the application for survey operates to reserve, withdraw, or segregate the land, so as to bar the initiation of rights thereto subject to the superior claims of the State. Such a rule does not help the State at all, and has no tendency to accomplish the purpose of the act. If the State has a preference right of selection under the act, it has everything which can possibly benefit it. The view that the application for survey creates an absolute reservation of the land is in no respect to the advantage of the State as a proprietor, and is directly to its disadvantage from a governmental standpoint, since it tends to discourage settlement and development.

The mischiefs which Congress sought to remedy in the act of 1894, and the advantage which it was intended to give to the State, are so plain and obvious that it is hard to see where respectable ground can be found from which to argue for a construction of the act of 1894 different from that heretofore given it by the Department. And it ought not to be necessary to carry the discussion farther. But there is another reason against the view that the act effects an absolute reservation of the land which is worthy of consideration.

The policy of the Government for many years past has been to encourage settlement upon unsurveyed lands, and there has been much legislation for the protection of such settlers. There has also been considerable legislation providing for the selection or other appropriation of unsurveyed lands, the grant of the right to select unsurveyed lands being frequently held out as a consideration for relinquishments and exchanges which could not have been obtained had the sole inducement been the right to make selections after survey. Except where lands have been withdrawn before survey for a definite national use, as for Indian, military, or forest reservations, or for national parks, it has never been the policy of the Government to prohibit, limit, or discourage settlement on unsurveyed lands or the appropriation thereof under acts permitting the selection of such lands. Where withdrawals or reservations have been made, it has always been for some such definite purpose—and this is equally true of temporary withdrawals made pending the consideration of the question whether the lands should be permanently withdrawn.

At an earlier stage of the history of the public grants for internal improvements, great tracts of land were frequently withdrawn by the Department for the protection of the beneficiaries of railroad and other grants, in advance of the time when rights under the grants could attach to specific lands. At first these withdrawals were sustained by the lower courts, and were not prohibited by Congress—indeed, in some of the earlier cases the courts seemed to find express Congressional authority for such withdrawals. But this practice was long ago overthrown

and abandoned, and in their later decisions the courts have held that such withdrawals were unauthorized and void, although made by the Secretary under supposed authority of statute. In short, the withdrawal of large bodies of land in aid of the beneficiary entitled to a portion of the land so withdrawn, or entitled to make selections therefrom in satisfaction of a quantity grant, is a practice which has been condemned and abandoned; and if this act is open to such an interpretation, we think it is the only example of such legislation which can now be found.

8.

Let us concede for the moment that the language of the act of 1894 is fairly open to either construction—let us even concede that upon the face of the statute, and as a matter of first impression, the construction against which we argue is the one which the Department might now adopt if the question were before it for the first time. Nevertheless the statute has been construed otherwise by the Department; that construction has been applied in a number of decisions; large quantities of land have been disposed of in that view; vested rights have attached; and it is doubtless true that numerous settlements and other claims have been initiated on the faith of the rule declared in previous departmental decisions. In this situation it seems especially appropriate to refer to the well settled rule that where an act is in any degree doubtful or ambiguous, in language or intent, the construction placed upon

it in contemporary administration by the Department charged with the duty of executing it, is entitled to great weight; and where such construction has been recognized and applied over a series of years, it should be deemed conclusive—even though such construction may be of doubtful correctness when considered as an original proposition.

La Roque v. United States, 239 U. S. 62, 64.

Logan v. Davis, 233 U. S. 613, 627.

United States v. Hammers, 221 U. S. 220, 228.

Louisiana v. Garfield, 211 U. S. 70, 76.

Hewitt v. Schultz, 180 U. S. 139, 156, 163.

United States v. Alabama, etc., Railroad, 142 U. S. 615, 621.

Heath v. Wallace, 138 U. S. 573, 582.

United States v. Moore, 95 U. S. 760, 763.

9.

The distinction between a blanket application for survey under the act of 1894, and a specific claim to appropriate particular land by homestead settlement, entry, selection, or other form of appropriation under the public land laws, should be kept clearly in mind.

In the latter case a specific, positive and unqualified claim of right to appropriate the particular land is fastened upon the land by the initial steps prescribed by law. And it is settled law that when such a claim is recognized and allowed by the local officers in a preliminary way, and becomes a matter of record in the Land Department, the land is segregated from the public domain; and while the

entry or selection remains uncancelled and intact of record, the land is not subject to any other form of appropriation, and no rights can be acquired by subsequent settlement, selection or application to enter.

An application for survey under the act of August 18, 1894, has no such characteristic. It is, in form and substance, a mere blanket application to the Land Department for the *survey* of a designated township or townships. By virtue of the statute the effect of the application, if the conditions of the act are complied with, is to give the State a preference right to select, running for a specified period, which may be exercised or not at the pleasure of the State. It does not commit the State to the selection or acceptance of any particular land in the township, nor even to the selection of *any* land therein, in satisfaction of its grants. It does not amount to an assertion of right to any particular land, nor fasten a claim upon any tract.

It is for this reason that the Department has repeatedly held that application for survey under the act of 1894 is *not* a barrier to the initiation of a claim under public land laws, subject to the preference right of the State; and that it gives the State no right to the land as against a subsequent withdrawal for a forest reserve under a proclamation containing an excepting clause in favor of any entry, filing or "lawful claim"—although such exception is held to protect fully a homestead settlement, timber and stone or desert land entry, or lien or indemnity selection.

It is true that if at the time the Railway Company selected the land in suit it had been subject to an existing claim, previously initiated, and then intact of record, it would not have been open to selection by the Railway

Company. But as the Department has repeatedly held, and as the trial court holds, a blanket application for survey (even if valid and effectual, as the application for survey now under consideration was not) accomplishes no such result. And the rule which has been established by the practice of the Land Department and the decisions of the courts, that the initiation of a specific claim to appropriate particular land, allowed in a preliminary way by the officers of the Land Department, and remaining intact of record, segregates the land against subsequent appropriation while the claim remains *sub judice* and undisposed of, has nothing to do with a case like this.

Again, as pointed out by the trial court, this rule applies only in cases where the prior application or entry has been *recognized or allowed*. "To have segregative effect an application or entry must in some way be accepted or recognized by the Land Department; having been allowed, even though erroneously, it is binding upon and segregates the land." (Tr., page 143.) And the State's application for survey was never accepted, recognized or allowed, in any form, until January, 1905; and then, its recognition and allowance were expressly made to date from *January 18, 1905*; only. (Tr., page 141.) The earliest departmental decision in any way upholding the validity of the application was that of *Thorpe v. State of Idaho*, 35 L. D. 640 (afterwards recalled and vacated) which was decided *June 27, 1907*. The Railway Company's selection was made *July 23, 1901*, three and a half years before the former and nearly six years before the latter date.

We may concede that if the lands had been "reserved" or "withdrawn" prior to the filing of the Railway Com-

pany's selection list, this would have barred the selection, under the language of the act of March 2, 1899. But in the first place it has been settled, so far as Departmental construction can settle it, that even a valid application for survey recognized and allowed by the Land Department does not operate to "reserve" or "withdraw" the land within the meaning of the act of 1899. In the next place, if that construction of the statute be disregarded, it is perfectly obvious that only a *valid* application for survey, or at the very least an application recognized and allowed by the Department, could operate as a "reservation" or "withdrawal."

It seems unnecessary to argue that the application for survey is not a "claim or right" to the particular land, which "attached" or was "initiated" within the meaning of the act of March 2, 1899. The meaning of those words, as used in the public land law is too well settled by numerous decisions of this Court. And this definition was firmly established in public land law terminology long before the act of 1899 was passed. Such words apply only to a specific claim of right to appropriate particular land, fastened upon the land by the initial steps which the law requires for the appropriation thereof. They do *not* apply to a blanket reservation or withdrawal or the acquisition of a preference right under an act like that of August 18, 1894.

III.

The Railway Company's selection was made by filing a proper selection list in the local land office at Coeur d'Alene, in conformity to the provisions of the act of 1899 and the regulations and practice of the Department applicable to such cases. This selection list was duly accepted and allowed by the local officers, and the selection duly noted upon the records of that office. In accordance with the established practice the selection list was subsequently transmitted to the General Land Office at Washington and accepted there; although final action thereon was necessarily deferred until after survey. But the acceptance and allowance of the selection by the local officers was never reversed or set aside; and the selection has remained "intact of record" at all times since the day the selection list was filed.

Now in the last preceding subdivision we had occasion to refer to the rule that an entry or selection allowed by the local land officers, whether valid or not, *segregates* the land against every other form of appropriation under the public land law, until such entry or selection is regularly cancelled upon the records of the Land Department. While such entry remains intact of record and uncancelled, no rights can be initiated or secured by any subsequent settlement, entry, application or selection, notwithstanding such previous entry or selection is irregular or invalid—even though it be subsequently cancelled or rejected by the Department.

In the present case the Railway Company's selection was duly presented to and approved and allowed by the local officers (and subsequently by the Commissioner of

the General Land Office and the Secretary of the Interior), and that selection stood of record, intact and uncancelled, at the time Delany made his alleged settlement on the land and at all times thereafter, until the issuance of patent. Therefore, this selection constituted a complete barrier against the attempt of Delany to acquire the land; and he secured no right under his settlement and application to enter; and this without regard to how far the status of the land may have been affected by the application for survey. So Delany's claim was properly rejected by the Land Department, however erroneous its allowance of the Railway Company's selection may have been.

Holt v. Murphy, 207 U. S. 407.

McMichael v. Murphy, 197 U. S. 304.

Hodges v. Colcord, 193 U. S. 192.

Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357.

Sturr v. Beck, 133 U. S. 541, 548.

Whitney v. Taylor, 158 U. S. 85, 93.

Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 644.

Witherspoon v. Duncan, 4 Wall. 210, 218.

Neff v. United States, (C. C. A. 8th Cir.) 165 Fed. 273, 281.

Germania Iron Co. v. James, (C. C. A. 8th Cir.) 89 Fed. 811.

James v. Germania Iron Co., (C. C. A. 8th Cir.) 107 Fed. 597.

Weyerhaeuser v. Hoyt, 219 U. S. 392.

And this is fatal to appellee's case. For it is familiar law that if error was committed by the Department in awarding patent to the Railway Company, it is not error of which Delany or his successor is entitled to complain. In cases like this it is not enough for the complainant to show error in awarding patent to his adversary; he must also show that if the law had been properly administered the patent would have been awarded to *him*. And if his application was rightly rejected, because the land was segregated against such claim as his at the time of his settlement and application to enter, a suit like this cannot be maintained.

Bohall v. Dilla, 114 U. S. 47, 51.

Sparks v. Pierre, 115 U. S. 408, 413.

Lee v. Johnson, 116 U. S. 48, 50.

Swelling Co. v. Kemp, 164 U. S. 636, 640, 647.

Leonard v. Lennox (C. C. A.) 181 Fed. 760, 762.

The cited cases demonstrate that the segregative effect of an entry or selection does not depend upon its inherent validity, but merely upon the fact that when presented it is recognized by the local officers and remains intact of record at the time a subsequent adverse claim is sought to be initiated. Whether valid or not it is a complete barrier against the attaching of any right by virtue of settlement, application, or otherwise, made while the prior entry or selection remains uncancelled of record. This is well explained in *Edith G. Halley*, 40 L. D. 393, where it is said:

"In *McMichael v. Murphy*, (197 U. S. 304) the court held that a settlement on land already covered of record by another entry, valid upon its face, does not

give such settler any right in the land, notwithstanding that the first entry might subsequently be relinquished or ascertained to be invalid by reason of facts dehors the record of such entry, and that the party first entering after the relinquishment or cancellation had priority over one attempting to enter prior to such relinquishment or cancellation. In that case, one who settled upon the land covered by a formal entry prior to its cancellation, was held to be inferior in right to the first applicant after the cancellation of the entry. In *James v. Germania Iron Company*, (C. C. A. 8th Cir. 89 Fed. 811, 107 Fed. 597) the court held that an entry of public land under the laws of the United States, whether legal or illegal, segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially cancelled and removed."

And there is no distinction in this respect between an ordinary homestead or other entry, and an indemnity or lieu selection accepted by the local officers and entered of record in their office.

Weyerhaeuser v. Hoyt, 219 U. S. 392.

Southern Pacific Railroad Co., 32 L. D. 51, 53.

Santa Fe Pacific Railroad Co., 33 L. D. 161, 162.

Santa Fe Pacific Railroad Co. v. Northern Pacific Ry. Co., 37 L. D. 593, 596.

Santa Fe Pacific Railroad Co. v. California, 34 L. D. 12.

Santa Fe Pacific Railroad Co. v. Northern Pacific Ry. Co., 37 L. D. 669, 671.

Coffin v. Moore (unreported), decided Jan. 10, 1911.

State of Idaho v. Northern Pacific Ry. Co., 42 L. D. 118, 123.

Eaton v. Northern Pacific Ry. Co., 33 L. D. 426.
Malone v. State of Montana, 41 L. D. 379.
Gallup v. Welch, 25 L. D. 3.
Hanson v. Roneson, 27 L. D. 382.
Northern Pacific Ry. Co. v. Wolfe, 28 L. D. 298.
Olson v. Hagemann, 29 L. D. 125.
Southern Pacific R. R. Co. v. California, 4 L. D. 437.
Southern Pacific Railroad Co. v. Cline, 10 L. D. 31.
George Schimmelpfennig, 15 L. D. 549.
St. Paul & Sioux City R. R. Co. v. Minnesota, 24 L. D. 364.
F. C. Flakle, 33 L. D. 233.
California & Oregon Land Co., 33 L. D. 395.
Santa Fe Pacific Railroad Co., 34 L. D. 119.
Porter v. Landrum, 31 L. D. 352.
O'Shea v. Coach, 33 L. D. 295.
Heirs of George Liebes, 33 L. D. 460.
Minnesota v. Leng, 25 L. D. 432.
Thomas v. Spence, 12 L. D. 639.

Some of the cases cited above involve railroad indemnity selections; some State school land indemnity selections; some State selections under general grants; and some lieu selections under acts like those of June 4, 1897, and March 2, 1899. But it is probably unnecessary for us to point out the precise similarity, so far as concerns the application of the rule, between those various classes of selections.

And in *Weyerhaeuser v. Hoyt, supra*, this Court quoted with express approval the language of Mr. Justice Van Devanter (then Assistant Attorney General) in *Southern Pacific Railroad Co.*, 32 L. D. 51, which runs as follows:

"A railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the Land Department as having the same segregative effect as a homestead or other entry made under the general land laws."

A good exposition of the reasons why the segregation rule must be applied to unapproved selections as much as to homestead entries will be found in the two opinions in *Santa Fe Pacific v. Northern Pacific*, 37 L.D. 593 and 37 L.D. 609. And in *Coffin v. Moore* (unreported, decided Jan. 10, 1911), it is said:

"It is true that an indemnity selection presented by a railroad company is not effective against the United States until approved by the Secretary of the Interior; that the Secretary's approval is essential to the validity of any such selection, as the statute provides that indemnity selections must be made under his approval. At the same time, however, it is absolutely necessary to a proper administration of the land laws that there should be some rule respecting the segregative effect of a railroad company's indemnity selection until such times as it can receive proper consideration from the officers whose duty it is to dispose of the same. Having under consideration the necessity for, and effect of, rules of the land department, the Circuit Court of Appeals for the Eighth Circuit has held that it is essential to the impartial exercise of such power as exists in the land department that rules and regulations should be adopted and steadily maintained establishing a uniform practice and method of procedure; that the legislation of Congress was ample for the establishment of such rules, and when promulgated they become a law of property and cannot be ignored by the Department to the subver-

sion of rights acquired under them; and, further, that an established rule of practice of the land department that after a decision by the Secretary has been made cancelling an entry of public lands, no subsequent entry of such lands can be made until a decision has been officially communicated to the local land officers and a notation of the cancellation made on their plats and records, is a proper, just and reasonable rule and is in accordance with the policy of Congress which makes the local offices the place for the initiation and establishment of all claims under its laws. See *Germany Iron Company v. Janes, et al.*, 89 Fed. Rep. 811."

There is some conflict of Departmental decisions as to whether a selection of unsurveyed land has the same segregative effect that an entry or selection of surveyed land, has. But an examination of the authorities cited will demonstrate that the reason for the rule is the same in either class of cases. And in *St. Paul, Minneapolis and Manitoba Railway Co. v. Donahue*, 210 U. S. 21, 40, it was held that a mere settlement on unsurveyed lands was sufficient to work segregation thereof against subsequent claims; which is, of course, conclusive authority against the suggested distinction between surveyed and unsurveyed lands with respect to the segregative effect of a selection thereof.

As explained in many of the decisions cited above, and also in the opinion of the Court of Appeals in *I. S. & C. M. & St. P. Ry. Co.*, 160 Fed. 818, the element upon which the segregative effect of an entry or selection depends is its recognition by the Land Department. As the Court says in the case last cited:

"The cases . . . all disclose an assertion of a right to certain land by claimants which was recognized in some manner by the Land Department. We understand the crucial test of segregation is found in such recognition. The right or claim, in order to constitute a segregation, must be such as is in some manner, either by receipt of fees for entry, permission to file upon the land, noting the filing upon tract-books, submission to a commission under treaty obligation, or other like affirmative action of the Land Department, discloses a recognition of the claim, or discloses some privity between the claimant and the United States."

And it is uniformly held that the acceptance of an application to enter or select by the local land officers, the receipt of fees by them, or the notation of the entry or selection upon the records of their office, is enough to give it segregative effect; regardless of whether this action is recognized, sanctioned or approved by the Department or the General Land Office, and regardless of whether the entry or selection is ultimately held valid or invalid.

IV.

Much was said in the courts below of the duty of the courts to apply the strictest possible construction to the act of 1899, as against the Railway Company and its grantee. But in the first place the act of 1899 is not a grant as counsel seems to understand that term. It is thus described by the Department and the courts:

"It was deemed necessary to the accomplishment of its purpose that the United States should own the

land placed in reservation by the act (original land grant act). A voluntary conveyance by the Railway Company was the most feasible method of reacquiring title to the granted land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The act is contractual in character, and terms and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer. This is especially true where this amounts to a limitation upon the enjoyment of the right by the party as to whom the contract still remains executory. In the opinion of the Department every element of a contract is present in the act of March 2, 1899."

State of Idaho v. Northern Pacific Railway Co.,
37 I. D. 135, 138.

West v. Edward Rutledge Timber Company, 210
Fed. 189, 199.

But even if the act of 1899 were subject to the same rules of construction as the original Northern Pacific grant, it does not follow that an especially strict construction should be applied. The rule in such cases is well stated in *Burke v. Southern Pacific Railroad Company*, 234 U. S. 669, 679, where Mr. Justice Van Devanter says of a grant similar to the Northern Pacific grant of 1864:

"We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. In-

stead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties *were brought into such contractual relations that the terms of the proposal became obligatory on both.* *Menotti v. Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, *it earned the right to the lands described.* Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant *should not be treated as a mere gift.*"

But the rule applied to railroad grant cases is really immaterial. For the act of 1899 contemplated an *exchange*, a bargain, in which the Government received *quid pro quo.* And the consideration to the Government passed to it, fully and completely, in July, 1899, and has been held and enjoyed by it ever since. The act should be construed as a *contract*, not as a *donation grant*, and as such its terms should be given a reasonable and liberal construction, such as will effectuate its purposes and se-

cure to the Railway Company and its successors in interest the rights conferred on them under the contract embodied in the act.

Respectfully submitted,

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CHARLES DONNELLY,

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Counsel for Appellants.

NOTE: Attention is called to the memorandum of errors in the printed record, and to the index of exhibits, which appear on pages 168-171 of the Transcript of Record.

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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 172.

EDWARD RUTLEDGE TIMBER COMPANY AND
NORTHERN PACIFIC RAILWAY COMPANY, AP-
PELLANTS,

v.

ALRA G. FARRELL, APPELLEE.

REPLY BRIEF FOR APPELLANTS.

CHARLES W. BUNN,
CHARLES DONNELLY,
STILES W. BURR,

Counsel for Appellants.

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REPLY BRIEF FOR APPELLANTS.

1. A considerable part of the brief for appellee is devoted to an argument that a description in terms of future survey can never be valid, under any circumstances or conditions. But, of course (as counsel conceded on oral argument), this question is foreclosed by the decision of this court in the West case (244 U. S., 90) and by the decisions of the court of appeals, the district court, and the Department cited in our original brief.

2. It is stoutly asserted in appellee's brief that "no such

practice ever existed"—*i. e.*, the practice of allowing or requiring selections of unsurveyed land to be made in terms of future survey. And a great part of the argument for appellee is based upon that assertion. Sufficient refutation is found in the Department's decisions in *Hanson v. Northern Pacific*, 38 L. D., 491, and *Daniels v. Northern Pacific*, 43 L. D., 381. But we need not rest there, for the records of the Land Department show that prior to the selection here involved (which was made July 23, 1901), hundreds of selections by the railway company under the act of March 2, 1899, of unsurveyed lands, aggregating many thousands of acres, had been received and allowed and subsequently passed to patent, and that in those cases the form of description was identical with the form here attacked. If further evidence that this then was the recognized practice is wanted, it will be found in *Northern Pacific v. Pyle*, 31 L. D., 396, decided July 31, 1902, although the sufficiency of such a description was not there questioned or doubted.

3. It is doubtless true that the first reported decision of the Department in which the sufficiency of this form of description, as applied to selections under the act of 1899, was directly sustained and upheld is *Hanson v. Northern Pacific*, 38 L. D., 491, decided March 16, 1910. But that was merely because its sufficiency had not theretofore been challenged. See *Daniels v. Northern Pacific*, 43 L. D., 381. The practice of describing unsurveyed lands in this manner had been uniform from the beginning; no other form had been used; such selections had been sustained in scores of cases in which other questions were litigated; selections covering many thou-

sands of acres of unsurveyed land so described had been approved and passed to patent, and the sufficiency of such description had never been doubted or questioned.

And it is settled law that rules or methods of procedure, fixed or sanctioned by usage or practice in the Land Department, have the same force and effect, and afford the same protection to parties complying with them, as rules or methods established by express regulation, "circular" or instructions, or by formal published decisions. See authorities cited on pages 27-38 of our original brief.

4. In one case only was doubt as to the sufficiency of a description in terms of future survey ever expressed. That was the case of *F. A. Hyde et al.*, 40 L. D., 284. The letter of Assistant Secretary Adams, referred to on pages 33-35 and 61-62 of appellee's brief, was merely a more or less informal inter-departmental communication in which the Assistant Secretary undertook to explain and defend his opinion in the Hyde case against criticism within the Department. The doctrine of the Hyde case was never recognized, followed, or applied by the Department, and the case was soon afterwards expressly overruled and repudiated (*Daniels v. Northern Pacific*, 43 L. D., 381). Furthermore, it is flatly in conflict with the decision of this court in the West case (244 U. S., 90).

But in the aspect of the case at bar, in which counsel for appellee invoke the Hyde case, it is interesting to note that the Hyde case did not deal with selections under the act of March 2, 1899, with which we are here concerned, but with selections under the act of June 4, 1897. And it is not dis-

puted that specific regulations, applicable to selections under the latter act, were promulgated in May, 1899, which expressly provided that "Every selection of unsurveyed land must designate the same by the description by which it will be known when surveyed." Counsel for appellee here rely upon the contention that there was no specific formal regulation applicable to selections under the act of March 2, 1899. And as sole authority for their position they invoke an overruled decision of the Department dealing with selections made in conformity to specific regulations applicable to the act under which those particular selections were made.

5. Counsel insist that in each of the three several decisions in which the claim of their client to the land here in suit was considered by the Secretary of the Interior—on the original hearing, on petition for rehearing, and on petition to the supervisory power of the Secretary—the case was disposed of without consideration of the *facts*; so that the decision was of a question of law merely, and did not involve the determination of a question of fact, or even a question of mixed law and fact. And the sole basis for this assertion is that in two of those decisions reference is made to the case of *Daniels v. Northern Pacific*, 43 L. D., 3881, as authority.

But in the Daniels case it was held that the form of description there and here challenged was sufficient to satisfy the statutory requirement of "a reasonable degree of certainty," because it could be tied in to a surveyed line already established in the vicinity. And in the case at bar (as the records of the Department show, and appellee's brief declares) the papers and briefs upon which the Department rendered the decisions complained of explicitly set forth and put great

emphasis upon the fact that *this* land was further from the nearest established survey line than was the Daniels land, and was in a rough country, etc., and urge that "under the clear and unmistakable language of the decision in the Daniels case" the description of *this* land in terms of future survey must be held uncertain and insufficient. It was in response to this argument that the Department said: "The description employed in this particular selection, under the decision in *Daniels v. Northern Pacific*, complied with the statute, as it was made with a reasonable degree of certainty."

How is it possible to construe this otherwise than as a holding that under the reasoning of the Daniels case to the effect that a description in terms of future survey is at least good where it can reasonably be tied in with established surveyed lines, when applied to the particular facts of this case, the description was sufficiently definite and certain to satisfy the statute? And what is that but the determination of a question of fact, or of mixed law and fact? For the question of law involved is no longer debatable. The reasoning of the Daniels case was adopted by the District Court and the Court of Appeals in the West case, and was accepted by this court in that case as sufficient to dispose of the question.

We think it affirmatively appears from the language of these decisions of the Department that the question was duly considered and determined, as a question of fact. And, of course, the decision of the Department of a question of fact, or of mixed law and fact, cannot be reviewed by the court. But it is at all events plain that these decisions are at least open to that inference, and that a contrary inference—such

as that which appellee's counsel contend for—would be strained and unreasonable. Furthermore, such an inference would flatly conflict with the presumption which must be indulged in support of the patent title—the presumption that the officers of the Land Department performed their duty to consider and determine the essential questions presented by the record and evidence before them. We beg leave to call attention to what is said on this general subject on pages 13-24 of our original brief.

6. Counsel misconceive our position as to the point dealt with at pages 27-39 of our original brief. We do not assert that where the question is one of *substantive law*—as, for instance, whether the land is subject to the particular form of appropriation, or whether the claimant is of the class entitled to take such land, or the like—the departmental construction of a statute is binding upon the Department itself or upon the courts. But we *do* assert that where the question is one of *practice and procedure merely*, and where the claimant has, in compliance with the rulings and instructions of the Department, taken the particular steps required by departmental regulations, in the manner prescribed by the Department under its administrative construction of the act, he is protected thereby and is not to be deprived of his rights upon the ground that such construction was ill-advised and that a different mode of procedure should have been prescribed. This is upon the principle that a claimant, who is by the statute entitled to take the particular land, should not be penalized for his obedience to the rules of *procedure* laid down by the officers of the Government to whom the

administration of the law is confided, and in whom is vested the authority and duty to construe the statute and prescribe rules and methods of procedure thereunder.

"Until a rule is changed it has all the force and effect of law, and acts done under it while it is in force must be regarded as legal."

See authorities cited on pages 29-38 of our original brief. Perhaps we may be excused for repeating here that the question now before this court is not one having to do with substantive rights under the statute. It is not a question of who can take under the act, or of what land may be taken, or of the extent or character of the appropriation. It is merely a question of *procedure*—of what steps should have been taken in order to perfect the right granted. The Department, construing the statute, pointed out the steps to be taken. The railway company followed the line thus marked out, faithfully and with exactness. The rights of the timber company were acquired on the faith of the regularity of the railway company's procedure, in the light of the departmental sanction given it. No one was misled of prejudiced by the fact that the railway company pursued the approved practice instead of adopting a different method. The railway company could just as well and just as easily have taken another course—have employed a different form of description—and it would have done so if the Department had so directed. And it cannot be pretended that appellee's position would have been improved if the Department *had* construed the act differently and required a different form of description.

7. On pages 56-57 of appellee's brief, counsel cite and quote at length from the opinion of the Supreme Court of Washington in *Bird Timber Co. v. Snohomish County*, 81 Wash., 416; 143 Pac., 433. The same matter appeared in the brief filed in this court by the same counsel in the West case, and is again ~~placed~~ on the attention of this court, notwithstanding it was ~~pointed~~ out in our brief in the West case that upon rehearing the Washington court *expressly withdrew* all it had said on the subject in its former opinion. *Bird Timber Co. v. Snohomish County*, 88 Wash., 90; 152 Pac., 689.

8. Counsel says that the act of March 2, 1899, is "unique;" that "no other statute requiring the same construction has ever been passed by Congress for the disposal of the public lands, and none ever gave the grantee such special privileges." Yet in the very particulars in which counsel terms the act of 1899 "unique" it is an almost, if not quite, literally exact copy of the act of August 5, 1892 (27 Stat. L., 390), which has frequently been passed upon by the Department and has been before this court for construction in at least two cases.

Nor is it true, as asserted in appellee's brief, that the act of 1899 has been held to be a "private" act. Certainly it was not so held in *Comstock v. Northern Pacific*, 34 L. D., 88, cited to that effect, nor in any other case we know of.

9. The inaccuracies mentioned in the preceding subdivision are probably neither material nor important. But the statement is repeatedly made in appellee's brief that the regulation of May 9, 1899, prescribing the manner in which

unsurveyed land should be described—that is, “by the description by which it will be known when surveyed”—was “*specifically revoked*” by circular of December 18, 1899 (29 L. D., 391). Upon this statement is built an argument that the provisions respecting the description of unsurveyed land were not in force after December, 1899, and consequently not in force when the selection here involved was made, in July, 1901. And this statement may be material, and is certainly specious and misleading.

For while the regulation of May, 1899, was amended in December, 1899, and the circular promulgating the amendment was ordered “substituted” for the May circular, the amendment so made had no relation whatever to the matter of *description*, and the December circular contained precisely the same provisions as to description as the May circular—copied verbatim from it.

10. The issue involving the effect of the application for survey made in behalf of the State of Idaho is so well covered by the thorough and scholarly opinion of the district judge (Transcript of Record, pp. 136-146; Appellants’ Brief, pp. 50-56) and by the authorities cited in our original brief, that there is little which need be added in the way of reply. There are a number of inaccurate statements in that part of appellee’s brief which is devoted to this issue, but only a few of them seem to require specific notice.

11. The case of *Northern Pacific v. State of Idaho*, 39 L. D., 583, so heavily relied on by counsel for appellee, is one of those cases which was overruled—“recalled and vacated”—in *Thorpe v. State of Idaho*, 43 L. D., 168. We re-

peat that this is the only case in which it was ever held that an application for survey, even where valid and effective (as in *Thorpe v. State of Idaho, supra*, this application was held *not to be*), operated to prevent the attaching of subsequent claims, subject to the preference right of the State. And in this aspect the decision in 39 L. D., 583, was directly in conflict with the decisions, both earlier and later, cited at pages 65-70 of our original brief. The unreported decision of *Carrie E. Shearer v. Northern Pacific*, referred to on page 73 of appellee's brief, was merely an interlocutory decision by the *Commissioner* under the instructions given by the Secretary in the opinion in 39 L. D., 583.

In passing, let us correct the impression under which counsel seems to labor, that the land here in suit was involved in the decision in 39 L. D., 583. It was not. Nor is it true, as counsel says, that the railway company's selection here involved was "three times"—or ever—canceled by the Department.

12. Counsel fails to grasp the distinction, with respect to segregative effect, between a blanket application for survey under the act of 1894 and an entry or selection of particular land, duly accepted and allowed by the local land officers and remaining intact of record. This distinction is clearly pointed out in the opinion of the district judge (Transcript, pp. 143-144) and in the authorities cited in our original brief (pp. 77-78), to which we beg to direct the attention of the court.

The cases cited by counsel for appellee on this point—notably those found at pages 74-75 and 88-90—illustrate this error. They are all cases dealing with a specific, affirma-

tive claim attaching to a particular tract of land. *McIntyre v. Roeschlau*, cited at page 74 and again at page 89 of their brief, is a conspicuous example.

13. The aspect of this case which presents the question whether, if the application for survey had been valid and effective and had taken effect before the railway company's selection list was filed, that selection would thereby be rendered invalid as against the *subsequent* settlement claim which appellee sets up (the State having failed to select), was before this court in *United States ex rel. Hall v. Payne, Secretary*, No. 95 of this term, decided December 18, 1920. And while that was a mandamus case, and hence did not require a definite and final construction of the act of 1894, the decision rendered sustains our position so far as it goes. In the opinion it is said:

"The direction of the act that the lands be reserved 'from any *adverse* appropriation' means necessarily an appropriation adverse to the State, and this gives color to the Secretary's view." (Italics by the Court.)

This proposition alone, if adhered to, is sufficient to dispose of the question. And at all events the decision in the *Hall* case conclusively disposes of the argument that the application for survey operated to withdraw the land from the jurisdiction of the Department.

14. There are many statements in the brief for appellee which are quite outside the record—not merely outside the record in this case, but outside the records of the Department

as well. And there are others which are obviously immaterial. We have not deemed it necessary to notice such statements in this brief; but our failure to do so should not be considered as an admission of their accuracy.

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JAMES D. MAHER,
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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 172.

EDWARD RUTLEDGE TIMBER COMPANY AND
NORTHERN PACIFIC RAILWAY COMPANY,
APPELLANTS,

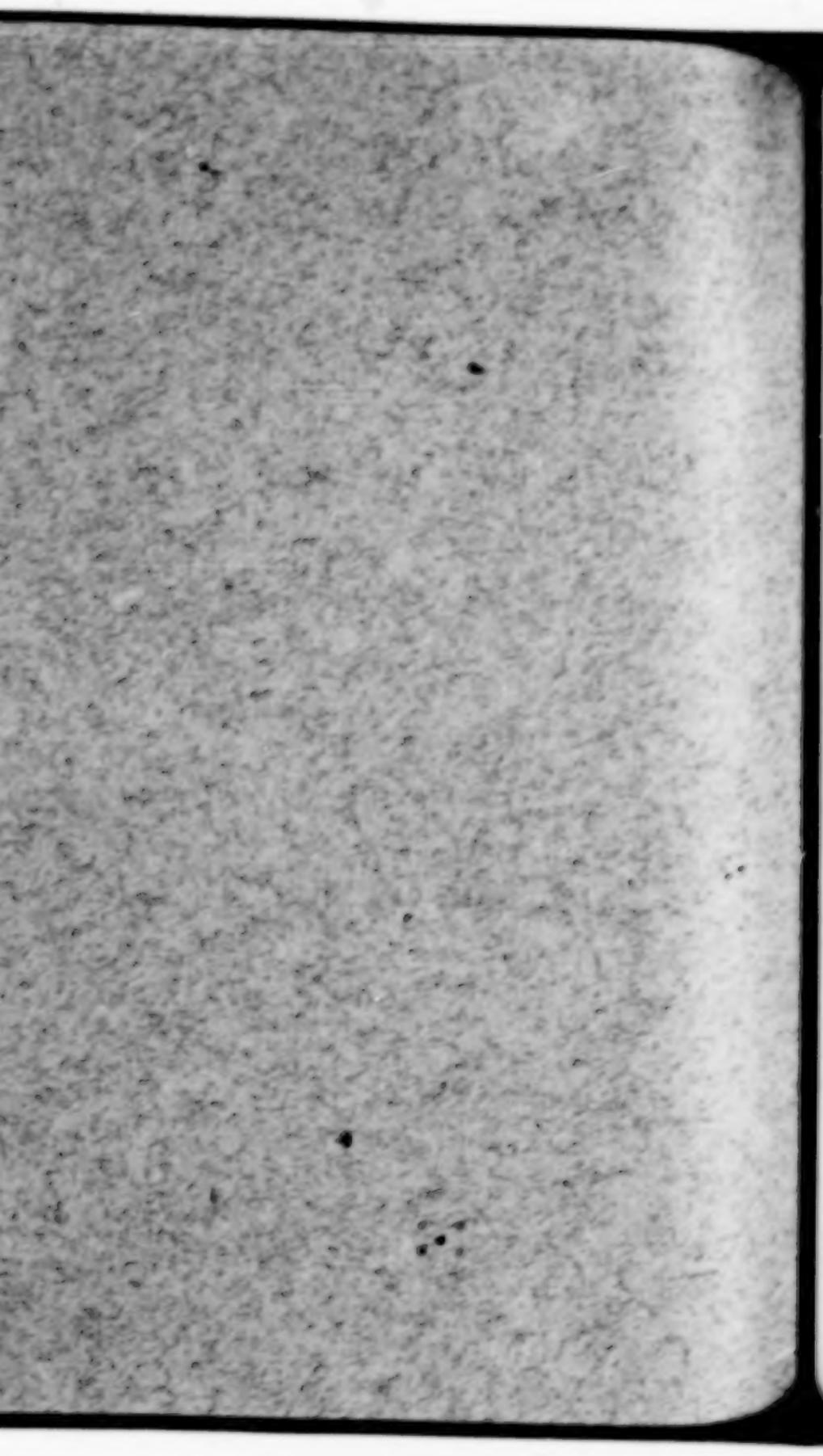
vs.
ALRA G. FARRELL, APPELLEE.

BRIEF FOR APPELLEE.

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vs.

ALRA G. FARRELL, APPELLEE.

BRIEF FOR APPELLEE.

The Issues.

This is an action commenced in the United States District Court for the District of Idaho by Belden M. Delaney against the Edward Rutledge Timber Company, transferee of the Northern Pacific Railway Company, to require the defendants to hold the land patented to the company as trustee for him, for the reason that it should have been patented to him under his homestead claim, which gave him a prior and superior right to the land. That title should not have been given to the company for the additional reasons, first, the description of the land which was unsurveyed, in its selection list in terms

of a future survey was not a compliance with the specific requirements of the Act of March 2, 1899, under which it was made which requires such a description as will designate the land with a reasonable degree of certainty, and that the land was not subject to its selection because of the application of the State of Idaho for survey under Act of August 18, 1894, made prior to the company selection. The death of Delaney having been suggested, the above-named plaintiff was substituted.

The District Court decided against Mrs. Farrell, who appealed to the Circuit Court of Appeals, which reversed the decision of the District Court (Fed. Rep., 758, p. 161) appeal by the defendants below, brings the case before this court.

We have been served with brief filed in this court by appellants in support of their assignment of errors.

STATEMENT OF FACTS.

Legislative History of the Act of March 2, 1899.

The Act of March 2, 1899 (30 Stat., 993) originated with the Northern Pacific Railroad Company, was introduced in both Houses of Congress, and urged by its friends, and was a movement on its part to exchange with the United States a part of its grant which at that time was almost, if not quite worthless, and obtain from them a new grant, not confined to its indemnity limits, as are the losses in all other railroad grants, but of 444,222 acres of the choicest remaining non-mineral lands, equal to

19½ townships—more than half the size of the State of Rhode Island—"lying within any State into or through which the railroad of the Northern Pacific Railroad Company runs." No other such grant was ever made by Congress and we are quite certain no other one giving such advantages will ever again be made. It is not in accordance with the record to say "the act was passed in furtherance of a design of the Government to obtain title to certain lands in the Mt. Rainier National Park, then owned by the defendant Railway Company," as claimed. On the contrary, as above stated, it was urged by the friends of the company in Congress, and *no official of the Government ever recommended it*, as is usual when such bills are introduced in Congress. However, the act was passed, conveyance made to the United States and the company is entitled to whatever falls within a strict construction of the act, but it has no equities.

Provisions of the Act of March 2, 1899.

The sections applying to this case are 3 and 4, which are as follows:

"Sec. 3. That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said Company, whether surveyed or unsurveyed, which lie opposite said com-

pany's constructed road, said company is hereby authorized to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual Government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States; Provided, that any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.

Sec. 4. That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the Company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company describing such tract according to such survey;

and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

Statute Unique.

As we have seen, this statute is unique in at least four particulars:

1. It requires that where land is unsurveyed the company in its selection *must describe the land with a reasonable degree of certainty.*
2. To be subject to selection it must be not only non-mineral in fact, but must have been *classified as non-mineral at the time of actual Government survey.*
3. Within three months after the plats of survey are filed in the local office a *new list* must be filed describing the tracts according to such survey.
4. If original selection shall not conform with the lines of the official survey the company shall be permitted to describe it anew so as to secure conformity.

No other statute, requiring the same construction, has ever been passed by Congress for the disposal of the public lands, and none ever gave the grantee such special privileges. It gave an unlimited commission to the company to roam over and select out before survey the most valuable lands, including timber lands, as in this township, in all the great public land States, worth many millions of dollars and many times the worthless land which

the Government had granted it, and which it gave in exchange. It follows it is only simple justice to strictly construe the act against the grantee. Wisconsin Central Ry. Co. vs. U. S., 164 U. S., 190 (Sutherland on Statutory Construction, sections 454 and 458; Am. and Eng. Enc. of L., Vol. 23, pp. 402 and 407); Slidell vs. Ember, 111 U. S., 412; Dubuque and Pacific Railway vs. Litchfield, 64 U. S. (23 How.), 166; Newton vs. Commissioners, 160 U. S., 548. In the case of the Northwestern Fertilizer Co. vs. Hyde Park, 97 U. S., 659, the rule of construction is thus stated:

"The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded, but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claimant. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this country."

In the case of Idaho vs. Northern Pac. Ry. Co., 42 L. D., 118, the Department having under consideration the Act of August 18, 1894, authorizing the State to make application for survey with a view to selection of the lands in lieu of losses, held:

"This was a statute granting a special privilege as against others seeking to appropriate public lands. It was held by Judge (later Justice) Lurton, in Campbellsville Lumber Company vs. Hubberd, 112 Fed.,

718, concurred in by Judge (now Justice) Day, that: 'An attentive consideration of the principle of statutory construction here involved leads us to conclude that when a statute gives a *new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the act should be strictly construed;* and the validity of all acts done under authority of such an act will depend upon a compliance with its terms. In respect to such acts the steps pointed out for the acquisition, preservation and enforcement of the remedies provided should be construed as mandatory, rather than optional.' "

The Departmental decisions follow this settled rule of construction.

In construing this grant, on the application of the company to be allowed to select lands in lieu of glaciers located within the boundaries of the Mt. Rainier land conveyed to the United States (40 L. D., 141), held:

"These glacial areas are rivers of ice and do not have such fixity and are not susceptible of such occupation or use. There was no undertaking by the United States that the quantity of land granted should equal any fixed number of acres and the company was entitled thereunder only to such lands as may be found to be in fact covered by the grant. *Sioux City & St. Paul Ry. Co.*, 159 U. S., 149.

"The Department is convinced that it was not the intention of Congress that such areas should be surveyed or disposed of as a part of the public lands of the United States, and that the grant to the Northern Pacific Railway Company did not convey the same.

If there be any doubt in the construction of the granting act in this respect it must be resolved against the railroad company under the settled rule that such statutes are to be strictly construed against the grantee, Wis. Central Railroad vs. U. S., 164 U. S., 190."

The Statute a Private Act.

Notwithstanding its title, the Department, in the case of *Comstolk vs. N. P. Ry. Co.*, 34 L. D., 88, held the amending Act of June 6, 1900, confining lieu selections under the Act of June 4, 1897, to surveyed lands, did not apply to the Act of March 2, 1899, for the reason the latter is a private act. It was also held that the act repealing the Act of 1897 did not repeal that act for the same reason.

It is not a remedial statute as there were no "wrongs to right nor mischiefs to cure." It constitutes an offer to exchange unidentified public lands for lands given the Northern Pacific Railroad Company by the United States in the grant to the road.

The construction given the act by the Department in the case of the *State of Idaho vs. N. P. Ry. Co.*, 37 L. D., 135, at p. 138, is as follows: That "the act is contractual in character and terms. * * * In the opinion of the Department, every element of a contract is present in the Act of March 2, 1899, and the act is complete in itself."

This being the position of the Department, as expressed in that case and as taken by counsel in the argument in this case, let us consider the act in this light.

The Act an Option.

First, then, it will be conceded that the act gives the railroad company an option to convey its lands and accept in lieu thereof lands falling strictly within its terms. In the nature of the case the company could not have been compelled by the act to accept its provisions as it owned the land. It was under no obligation, either legal or moral, to convey any of its lands. Neither was it bound to take unsurveyed lands for lands conveyed. Counsel conceding the act is contractual, and on its face it is strictly an option only, let us see what rules of law apply to it.

In the case of *Carr vs. Duval et al.*, 14 Pet., 77, the Supreme Court quoting *Eleason vs. Henshaw*, 4 Wheat., 228, held:

"An offer of a bargain by one person to another imposes no obligations upon the former, unless it is accepted by the latter, according to the terms in which the offer is made."

In the case of *Minneapolis and St. L. Ry. Co. vs. Columbus Rolling Mill Co.*, 119 U. S., 149, it was held:

"A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer and puts an end to the negotiations."

In *Cyclopedia of Law and Procedure*, Vol. 9, pp. 265 and 276, the rule is thus stated:

"The acceptance of an offer must be absolute and any conditions as to time, place, quantity, mode of acceptance or other matters which it may please him to insert in and make a part thereof and the acceptance to conclude the agreement must in every respect meet and correspond with the offer neither falling within or going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand."

"An acceptance, to be effectual, must be identical with the offer and unconditional" (p. 267).

In Am. and Eng. Enc. of Law, Vol. 3, p. 852, the rule is thus stated:

"The acceptance of an offer must be absolute and unqualified, for until there is such an acceptance, the negotiations of the parties amount to nothing more than proposals and counter-proposals.

"Acceptance must be unequivocal, unconditional and without variance from proposal." *Strange vs. Crawley*, 7 West. Rep. (Mo.), 106.

It follows, therefore, that construing the act as the company insists it must be construed, it can get no land that does not fall "unequivocally and unconditionally and without variance" from the precise terms of the offer. See also U. S. vs. N. P. Ry. Co., 170 Fed., 498, and N. P. Ry. Co. vs. U. S., 176 Fed., 706.

Have the Decisions of the Department in the Adjustment of This Grant Been Quite Fair to the Settlers?

The quotation, by the Circuit Court of Appeals, in its decision in this case, from the decision of this court, ren-

dered more than seventy years ago, in the case of Lytle vs. State of Arkansas, 9 How., 314, that to the national feeling towards the pioneer who is found in advance of our settlements, who encounters many hardships, and is generally poor, in favor of rewarding him for his enterprise, had been shown by the course of legislation for many years. And the case of Ard vs. Brandon, 156 U. S., 537, in which this court said:

"The law deals tenderly with one who in good faith goes upon the public lands with a view of making a home thereon."

is most appropriate in this case.

The court, with equal propriety, might have quoted from the decision of this court, announced by Mr. Justice Brewer, in the case of the Northern Pacific Railway Company vs. Amacker, 175 U. S., 564, wherein it was said:

"The contest in this case is between one claiming under a homestead entry and the company claiming under a grant in aid of the railroad. It was long ago said by this court that 'the policy of the federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements over that of any other person. * * *'

"There is no real hardship in enforcing this rule, for, if the individual seeking to maintain his home-

stead entry fails by reason of any defect he has no recourse on the Government for the fees he has paid or for any compensation for the time and labor he has expended, while, on the other hand, the general provision of the railroad land grant is to the effect that if the title to any tract within the place limits fails the company may reimburse itself by a selection within indemnity limits. It is not, therefore, strange that the rulings of the Land Department, as well as of the courts, have been uniformly favorable to the individual contesting with a railroad company the right to a particular tract of land."

It may be added that under all administrations the doctrine enunciated in these cases has been frequently quoted as its true guide in the decision of cases involving settler's claims. But, notwithstanding this, we assert, the record will show that, with a possible exception, no administration of the Department has been quite fair to the settlers in their conflicts with the company under this grant.

As corroboration of this assertion, attention is invited to the decision in the Hanson case, 38 L. D., 491 (of which the West case was a part, as he with nine others signed the petition upon which the decision was rendered), wherein after stating that when the motion was entertained the Department had grave doubts as to the sufficiency of a description such as we have in the case at bar, and subsequently regulations of November 3, 1909 (38 L. D., 288), were issued requiring more precision, it was added:

"It appeared that the practice of allowing selections by the railway company as these selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations."

In point of fact, *no such practice had ever existed.* It is possible the company may have succeeded in getting lands patented under such description, as was stated by counsel in printed brief for the company, filed in that case, signed by Mr. Burr and others as attorneys for the company, wherein it is said:

"No formal regulations were adopted under the Act of 1899, but it was instead informally arranged between the Department and the company that the latter selections should be made in the form and manner prescribed for selections under the Act of 1898. And this has been done for twelve years."

But the Hansen case was the *first case* decided where *a conflict between a settler and the company under this grant reached the Department for decision.* It cannot be doubted that the First Assistant Secretary, who signed the decision, was astounded when falsely informed by his subordinates that a "long standing and uniform practice" had existed to accept such a description as sufficient. If there had been such *practice, the rule, regulation, decision, or case or cases in which it had received official sanction would have been quickly pointed out.* None such existed.

On the contrary, the circulars issued under the Act of 1895, procured by the company for classifying of the identical lands (20 L. D., 350) contained the following provisions as to *unsurveyed* lands:

"Observe the difference that the land must necessarily be described by natural objects and permanent monuments to identify the same."

And when that act was extended, under another administration, exactly the same language was used (39 L. D., 116).

Again, at the request of the Railway Company, an oral hearing before the Department was granted in its conflict with the homestead claim of Kip Calkins Miles, in which case an elaborate hearing had taken place and all the facts were in the record before it. Counsel representing the settlers challenged the Secretary, the Commissioner, and any and all the Assistant Attorney General's force who were present, to name a single case sustaining the claim in the Hanson case of a long uniform practice to accept such descriptions as sufficient, and *no case could be found.* But, was the Department fair enough to the settlers to admit this? Unfortunately it was not.

No other case was mentioned at the oral hearing, and as Mrs. Miles was present, during some disputed point she offered to be sworn and testify, but this was not per-

mitted. The course this case took thereafter needs only to be stated in plain unambiguous language to fully demonstrate our statement of lack of fairness to settlers in deciding their conflicts with the company under this grant. *No decision was rendered in her case as the result of this hearing*, requested by the company in her case, although as before stated, it was the only case mentioned by counsel on either side as then pending, involving this question. To our utter amazement it resulted in the decision of the Daniels case. This was not an accident, and when it is considered that the Daniels claim had been rejected and he had filed a contest in which the charge was made "that the selection was illegal and void, inasmuch as the company had wholly failed to post notice on the land," the course pursued would seem unaccountable, consistent with fair dealing, and yet, the difference in the proximity of surveyed lines in the cases would seem to account for making it the leading case instead of the Miles case in which the hearing was requested and which alone was argued. The decision in the Daniels case states:

"Every person who took pains to examine the list understood that the western and eastern boundaries of the tract selected were respectively $\frac{3}{4}$ of a mile and a mile east of the western boundary of the township and that its southern and northern boundaries were $1\frac{1}{4}$ and $1\frac{3}{4}$ miles north of the southern Twp. line."

In other words, the nearest surveyed lines to the tracts were $\frac{3}{4}$ of a mile one way and $1\frac{1}{4}$ miles the other way. While this is the case, the nearest surveyed line to the land of Mrs. Miles' claim was 12 miles. And still further, when we literally begged the Department in her behalf to state *this fact* which was shown by a letter on file from the Commissioner, it was flatly refused and it was held it was ruled by the Daniels case, comment seems unnecessary. With such cases before us, it may sometimes be doubted whether the proud boast of Mr. Justice Mathews in the case of Yick Wo vs. Hopkins, 118 U. S. 356, as quoted and commented upon by Mr. Justice Brewer in the case of Gulf Col. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150, as follows:

"When we consider the nature and the theory of our institutions of Government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of ~~merely~~ personal and arbitrary power"

was a little overdrawn. If this action was not arbitrary, and did not leave Mrs. Miles without a part of the legal remedy to which she was entitled, we do not know what to call it. The case at bar was nearly as bad, and if possible the action of the officers of the Land Department was even more arbitrary.

The Decision of the Circuit Court of Appeals.

After stating the facts, Circuit Judge Gilbert, speaking for the court, announced the following opinion and decision:

"Before Gilbert and Morrow, Circuit Judges, and Dooling, District Judge.

"The appellant contends that the land was not described in the railway company's list so as to designate the same with a reasonable degree of certainty. The appellees contend (1) that the lands were designated with a reasonable degree of certainty, and (2) that the acceptance of the list and the issuance of patent by the Land Office involved the finding of fact that the lands were designated with a reasonable degree of certainty, and that such a finding of fact is conclusive.

"(1) We find in this case no decision of fact that the description of the land as listed by the railway company designated the same with a reasonable degree of certainty. The record shows, on the contrary, that no decision was made on the facts of the case, and that the action of the Land Office was but the application of the settled rule of practice which it followed in all cases, that all unsurveyed lands listed by a railway company as lieu lands are designated with a reasonable degree of certainty if they are designated by the description applicable to them after they shall have been surveyed. Thus on the appeal the decision of the Secretary of the Interior states, not that the rejection of Delany's application

was supported by the facts, but that it was supported by the reasons given by the Department in its decision in Daniels vs. Northern Pac. Ry. Co., 43 Land Dec., 381. Turning to that decision, we find it stating that all lists filed for lieu lands by railway companies were accepted under general regulations of the Department in every case where the lands were described in the terms of future survey, and the decision points to the Act of Congress of July 1, 1898 (30 Stat., 620, c. 546), which provided that lands under that act be selected in terms of a future survey, as sanctioning the propriety of the settled practice of the Land Department.

"Conceding that the Act of 1898 had the meaning attributed to it, it is to be observed that a year later, in enacting the statute under which the lieu lands were selected in the present case, Congress adopted a different provision and required, not that the lands be described in terms of future survey, but that they be designated with a reasonable degree of certainty, which, as we take it, means that Congress was not satisfied that the prior statute and prior practice were adequate in every case for the description of listed lands, but that other means of identification might become necessary in view of possible facts which would render the description in terms of future survey inadequate. In the present case, it is clear that the particular circumstances attending this lieu land selection were not taken into consideration by the Land Department. They did not decide that the description was reasonably sufficient, as applied to this particular tract of land. They applied only a

rule of practice, and in so doing decided a question of law and not a question of fact.

"A similar case was before us. *West vs. Edward Rutledge Timber Co.*, 221 Fed., 30; 136 C. C. A., 556, in which we sustained the court below in ruling that the railway company's designation of a list of unsurveyed land by the description by which it would be known when surveyed was legally sufficient, where the tract was within three miles of a surveyed township and could be located with approximate certainty. In that case we said:

"It may be conceded, in so far as it respects this case, that a description of a section or a quarter section by legal subdivisions in the fastnesses of the Cascades or Rocky Mountain ranges, far distant from any government survey, or even generally that a description in terms of future survey, is not such a description as is contemplated by the statute. What may be a sufficient description for designating the tract under one set of circumstances might be wholly insufficient under another."

"Our decision was affirmed in *West vs. Rutledge Timber Co.*, 244 U. S., 90, 37 Sup. Ct., 587; 61 L. Ed., 1010. In that case the court said:

"What was a description having "a reasonable degree of certainty" was to be determined by the circumstances. It was in the nature of a question of fact and had tests for decision, as the Court of Appeals pointed out."

"This means that the question is in the nature of a question of fact when it is determinable according to the proper tests applicable to facts. It does not mean that the adoption and application of a general rule of practice by the Land Office is a decision of a question of fact.

"(2) We are of the opinion that to designate the section of land in which the section in controversy is situated in terms of a future survey was wholly insufficient to designate the same with a reasonable degree of certainty. In the West Case, this court said:

"'But the farther they remove from an established survey, it stands to reason, the greater will be the difficulty of setting foot on the identical tract, until eventually no reasonable being could expect another to tie back to a known surety for the purpose of identification.'

"With the uncertainty there foreshadowed we are here brought face to face. The homestead settler here could not, without the expenditure of a large sum of money, ascertain in what section his land would be when finally surveyed. The land was $7\frac{1}{2}$ miles from a known survey, and the intervening space was a rough, mountainous, timbered country. Even if he had gone to the expense of a survey, he could not know that the Government survey would coincide with his. By the Act of May 14, 1880, c. 89, 21 Stat., 141 (Comp. St. §§ 4536-4538), he was given the right to make his homestead upon unsurveyed lands. He duly marked the boundaries of his claim,

and made his residence thereon. He selected a parcel of land in an unsurveyed township, with nothing on the ground or on record in the plats of the local land office to notify him that the tract had been selected by the railway company. Said the court in *Lytle vs. State of Arkansas*, 9 How., 314, 333 (13 L. Ed., 153) :

“ ‘The adventurous pioneer, who is found in advance of our settlements, encounters many hardships, and not infrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres. That this is the national feeling is shown by the course of legislation for many years.’ ”

“ And in *Ard vs. Brandon*, 156 U. S., 537, 543, 15 Sup. Ct., 406, 409 (39 L. Ed., 524), the court said :

“ ‘The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon.’ ”

“ The view which we have taken of this branch of the case renders it unnecessary to consider the other assignments of error.

“ The decree is reversed, and the cause is remanded to the court below, with instructions to enter a decree for the appellant as prayed for in the bill.”

Although counsel after reciting the decision of the Circuit Court of Appeals and the District Court in the West Case, are unkind enough to say of this decision :

"Yet in the case at bar the Court of Appeals is in the teeth of its own decision and the decision of this court in the West Case, and by a process of reasoning we find it hard to follow, held the description insufficient and reversed the decree of the District Court. * * * And its decision went on exceedingly narrow lines."

It is to be regretted counsel find themselves in such serious trouble to understand the reasoning in a decision which is contrary to their contention, and to the interest of their clients, but we hardly think this is the fault of the court. It seems to us the decision fully sets out its reasoning in the West Case, as a proper basis for its decision in this case, and we must differ from counsel and say, in our opinion it is in entire harmony with its decision in that case and its affirmance by this court as well.

But they bring a more serious charge against the decree of the court in this case. At page 19 of their brief they are at considerable pains to point out a number of inaccuracies of description of the facts found by the court below, contained in the statement prefixed to its opinion, concluding, however, that

"These inaccuracies may be of no great importance—in our view of the case they are, of course, immaterial. But taken together they give the case a color and twist which tends to convey a false impression, especially as to what counsel called the 'equities' of the claimant Delany and some sort of impression seems to have influenced the Court of Appeals itself."

After expressing confidence in the sincerity and good faith of these eminent judges, they said:

"But we think the opinion evinces an unfortunate looseness of grasp of the facts and the record. Nothing less could explain the court's extraordinary error respecting the issue decided by the Land Department, which error is the very foundation of the decision appealed from." We are sorry our brothers lost their usual serenity in argument, and so far forgot themselves as to charge, that although in their view the inaccuracies they set out in the courts quoting the decision of the facts as found by the court below," are immaterial, "taken together they give the case a color and twist which tends to convey a false impression and that the opinion evinces an unfortunate looseness of grasp of the facts and the record."

Why all this, if in their opinion they are immaterial. If immaterial, why quibble over them? But the sting is added in the last paragraph wherein it is said:

"Nothing else could explain the court's extraordinary error respecting the issues decided by the Land Department, which error is the very foundation of the decision appealed from."

Quite a waste of words, it strikes us, to get at this most remarkable charge, which in our opinion is without any foundation.

This particular grievance against the decision of the court is based upon the failure of the court to set out or

refer to the following language in the decision of Assistant Secretary Jones in denying Delany's petition for the exercise of the supervisory power of the Secretary, which failure it is claimed goes to the very foundation of the decision appealed from, viz.:

"The description employed in this particular selection, *under the description in Daniels vs. Northern Pacific Railway Company, supra, complied with the statute*, as it was made with a reasonable degree of certainty."

This was and is but another way of expressing the rule laid down in that case as to what was necessary to comply with the statute. An examination of that decision shows it states:

"Every person who took pains to examine the list understood that the western and eastern boundaries of the tracts selected were, respectively, *three-quarters of a mile and a mile east* of the western boundary of the township and that its southern end boundaries were *one and a quarter and one and three-quarters miles north* of the southern township line."

That decision lays down the rule, based upon this selection that:

"If, therefore, at the date of the selection any line of public survey has been established in the vicinity of the selected land (three-quarters of a mile), it is not believed that a selection *like the one under consideration* lacks, in fact, any reasonable certainty."

Will it be seriously contended when the decision on the motion for supervisory power was denied and the Department said,

"under the decision in Daniels vs. Northern Pacific Railway Company, the selection complied with the statute, as it was made with a reasonable degree of certainty."

it was intended to be held it occupied the same relation to established lines of survey, as was the fact in that case? If so, it is a fraud on its face, false in every particular and contradictory of the record, of which the court will take judicial notice. Caha vs. U. S., 152 U. S., 211; Heath vs. Wallace, 138 U. S., 573.

In our printed brief on this motion filed in the Department, among other things we said:

"In the Daniels case you held that at date of selection a public survey was established three-fourths of a mile and a mile east of the western boundary of the township and that its southern and northern lines one and a fourth and one and three-fourths miles north of the southern township line, holding this was in the 'vicinity.' Shall we consider this a fixed rule, or is the question left in all cases to the writer of the decision or the person who signs it, *for in the case at bar, no public survey is referred to, without which such a description is not a compliance with the law as thus held.* If the only thing the Daniels case settled was to allow all kind of latitude in construing the word 'vicinity,' and the rights of settlers are left to

the individual views of the writer of future decisions, or of the official signing the same, then, so far as settlers are concerned, the Daniels case might as well not have been decided, but the question still left in the air, as it undoubtedly is if such a construction is to prevail.

"It is this 'unlimited, undefined discretion' against which the Supreme Court in a recent case of Daniels vs. Wagner, 237 U. S., 547, inveighed in no uncertain terms."

The answer to this was the paragraph the omission of which is complained of by appellants. How then can it be urged Secretary Jones considered the facts held in the Daniels case as necessary to constitute a compliance with the act? Certainly it would be most unreasonable, and we are quite sure will be so considered by this court.

Again in an action in the courts in such case, what may be properly considered as the decision of the Department? Is it the original decision which the Department refuses to entertain a motion to rehear? Or, is it the decision refusing to grant the petition for the exercise by the Secretary of supervisory authority? In both of which disturbance of the decision is refused. If the decision which the Department refuses under both proceedings allowed by the Rules of Practice to disturb, then what was said in refusing to grant our petition is not a part of the decision, and hence immaterial? Upon inquiry, at the Department we were told it would be glad if this court would settle that question.

This decision is in entire harmony on this point with their decision in the West case, which was affirmed by this court (244 U. S., 90). In both decisions it was held the question whether the description given was a compliance with the statute which required such a description as would designate the land with reasonable certainty, was one depending in some measure at least upon its proximity to established lines of survey, and that each case must depend upon the conditions shown to exist.

I.

Argument.

We have devoted considerable attention to the proper construction of the Act of March 2, 1899, for the reason that counsel for appellants in their brief, insist it was and is, proper to apply to the execution of the act rules and regulations formulated by the Department under various other acts which are entitled to different construction; insisting the act should have a reasonable as opposed to a strict construction. To avoid any possible misstatement of their position, we quote the following from the first page, subdivision 6, of their brief as their contention:

"As the railway company's selection was made in exact compliance with the procedure required by departmental regulations, practice and rulings, it cannot now be overthrown by a retroactive decision that the rule thus established by the Department was erroneous."

At p. 23 they go further and say:

"In discharge of the duties thus imposed upon them, the officers of the Land Department determined that a description in terms of future survey was not only sufficiently definite and certain to comply with the act, but was the best, most convenient and most practical form of description. For in the regulations to which reference has already been made, the Land Department not only permitted this form of description, but made it mandatory and exclusive—save in exceptional cases with which we are not here concerned."

The only part of this statement to which we are prepared to give our hearty approval of its accuracy is that "it was the most convenient form of description," if no thought be given to the rights of intending settlers or other claimants, which would seem to be the case, for any clerk could sit down in its office and cover a township with paper selections in an incredibly short time, while the settler must not only make his settlement, establish his residence, but must post his notices on the land and mark his boundaries. Notwithstanding the earnestness with which they attempt to sustain their position, by the citation of and quotation from a large number of departmental decisions and circulars governing other acts, they utterly fail to show by any, or all of them combined—

First. That any circular was ever issued for the carrying into effect of this act, which, we have seen, contain most unusual requirements and gave the company the

right to select nearly a half million acres of unsurveyed land in nearly all of the great public land States.

Second, That by any decision, order, or other official act the company was ever authorized to apply the requirement of circulars governing the execution of other acts in making its selection.

Three, That any railroad or other grant made by the United States contained the same requirements as are specifically made in this act.

It may be observed that their statement is "the Land Department determined." But this is their statement only, and evidently was oral and rests in the memory, as no record is referred to to sustain it. The Land Department determines such matters, particularly where so large a body of land may be selected under such "*absolutely new and essentially different requirements* from that of any other act which they were ever called upon to enforce, by some official act of record not resting in the memory of the attorneys of the company, or others, for that matter. As we have seen, in the oral argument in the Miles case counsel for the company, and the Assistant Secretary of the Interior, the Commissioner of the Land Office and the Assistant Attorney General for the Department and his principal assistants, being present, were challenged to furnish a reference to any official action sustaining this claim, then, as now, made. *None was cited, none ever has been and never can be.*

What, then, becomes of the contention that not only were selections such as those in this case, *permitted*,

but were *mandatorily and exclusively required*. Under what circular and by what specific order? Such a statement should be backed up by reference to this remarkable direction or order. Their position, as stated at page 5, is, that "by regulations originally adopted by the Interior Department, in the administration of similar lieu selection acts previously enacted, permitting the selection of unsurveyed lands, such regulations were by the *Department made applicable to selection under the Act of 1899.*"

The Circular of May 9, 1899 (28 L. D., 521), under Act of June 4, 1897, known as the Forest Lieu Act, is quoted as sustaining this contention. But does it do so? This regulation, even if applicable (which it is not), allows a description such as that in the case at bar only when "practical." The most that can properly be said of this regulation is that it is a concession that there may be cases in which it would be practical to so describe land, but it was evidently meant this was the exception, just as the Circuit Court of Appeals and this court held in the West case, *supra*. But the fact that it is followed by the requirement of a metes and bounds description when it is not practicable should be convincing evidence of the fact that counsel are in error when they state this first form was made mandatory and exclusive.

These are most unusual requirements, not at all in harmony with the practice of the Land Office under either its Rules of Practice, or of regulations or instructions governing the disposal of cases under general or special acts,

and there should be some official action shown why this was done under this act.

Reference is made to the Hanson case, the Daniels case, and the decision of the District Court in the West case, but *not to that of the Circuit Court of Appeals nor of this court in the latter case.* An examination of the Daniels case (43 L. D., 581) shows it does not bear out this contention. What is there said is, that "these regulations contained a provision broad enough to cover all selections of unsurveyed land under any Act of Congress in which the *only requirement* as to description was that the land should be designated according to the description by which it would be known when surveyed if that be practicable."

But there is *no such requirement* in the Act of March 2, 1899, and in no other one, so far as we now recall, except possibly that of July 1, 1898, contains such a requirement. We need not add that the Circuit Court of Appeals successfully met the contention as to this act, by the statement that in the enactment of the Act of 1899 Congress was not satisfied with the requirements of that act, and required that it should be described in such manner as to "designate the same, with a reasonable degree of certainty."

Neither the Hanson case, *supra*, nor the Daniels case, cited, sustain their contention.

In conclusion, upon this point, can it be necessary to again call attention to the fact that at the date of this selection, July 23, 1901, this Circular, quoted and relied

upon had been specifically and in terms, revoked, viz., on Dec. 18, 1899 (29 L. D., 391). The same is true as to the Circular of August 11, 1898, and of Nov. 15, 1899, and the Circular of December 18, 1899, substituted in their stead.

Now this substituted circular as shown at bottom of page 392, provides as follows:

"In all selections of unsurveyed land, notice of selection commencing within 20 days thereafter, must be given for a period of 30 days, by posting upon the land and in the local office, and by publication at the cost of the applicant in a newspaper designated by the Register as of general circulation in the vicinity of the land and published nearest thereto."

If, then, as claimed by counsel, circulars issued under the Act of June 4, 1897, were applicable and were applied mandatorily and exclusively by direction of the Land Department instead of the description given, in addition to this requirement, the selector was required to give thirty days' notice by posting on the land and in the local office and by publication in a newspaper to be designated by the Register. *This circular was the only one under this act in force at the time of the selection in this case.* Will it still be insisted this circular was applicable? If so, this branch of the contention must fall to the ground. The statement in the Daniels case, *supra*, that the instructions of May 9, 1899, were applied by the Land Department to all selections of unsurveyed lands until the adop-

tion of the regulations of November, 1909, is likewise erroneous, and so far as shown, without any foundation whatever in fact. The same may be said of the decision in the Hanson case (38 L. D., 491), wherein the Department refused to make the circular of November 3, 1909, retroactive for the reason that "the practice of allowing selections by the railway company as these selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations" although made specifically retroactive on their face. It is sufficient to say he was misinformed. In both instances this circular of May 9, 1899, not then being in existence, having been revoked within seven months and nine days from its date, viz., from May 9 to December 18, 1899, upon which date the latter circular which we have seen requires notice by posting on the land and in the local office and by publication in a newspaper was substituted, none of which requirements were complied with in this case.

In support of our position, in addition to the fact that when challenged to show any official action, authorizing such practice, none could be shown, there is on file in the Land Department a letter of First Assistant Secretary Adams, addressed to the Commissioner of the General Land Office, in answer to his argument against the soundness of the departmental decision in the case of F. A. Hyde *et al.*, 40 L. D., 254, wherein, referring to the Hanson case, it is said:

"The text of that decision does not show whether or not Hanson settled before survey, and for this and other reasons I do not at this time care to express an opinion as to the soundness of said decision." * * *

"In conclusion I have to say that in the study of the various acts of Congress, above mentioned, I was profoundly impressed with the thought that while they permitted and authorized the initiation of claims to unsurveyed lands, they all evidently contemplated that such lands should be identified in some appropriate and effective way. There is nothing in any of these acts justifying another conclusion. If, in the administration of these laws, *it has been assumed that identification would be accomplished by such description as is now contended for on the ground of precedent, such assumption was unwarranted.*

"To describe a tract of land as what will be, when surveyed, a certain parcel of the public domain is certainly indefinite. It means nothing except that in such case the selector thereby expects to initiate a preference claim to land somewhere without giving notice to other persons who may wish to make an appropriation under the same or other laws, and who, after he has gone upon the public domain, in pursuance of such lawful design and marked his claim, and perhaps cultivated and improved it, may be awakened years thereafter to find that it is lost to him by reason of a prior appropriation of which he had no notice either in law or in fact. *The proposition, therefore, seems to lead to a preposterous result, and in my opinion, cannot be entertained.*"

January 16, 1912, nearly two years after the decision in the Hanson case, viz., March 16, 1910, the foregoing letter of Secretary Adams was written and is a complete refutation of the finding in that case as to the practice in the Department. It is true Secretary Hitchcock; in the case of A. J. Herrall (29 L. D., 553) declined to enforce this circular against him on the ground that his claim had been regularly accepted and approved before the date of the act. But the selection at bar was not only not accepted, but was not made until a year and a half after these substituted regulations were in force. So much for circulars under the Act of June 4, 1897, which counsel claim were applicable and were by the Land Department mandatorily and exclusively required to be applied to its selections of unsurveyed land under the act. The attention of the Land Department and of the courts was specifically called by us to these facts, but do not seem to have had any attention. As to the refusal to make the circular retroactive because it would be unfair, if not illegal, Secretary (afterwards Justice) Lamar in the matter of railroad indemnity selections had no hesitation in making his drastic circular of August 4, 1885 (4 L. D., 90), requiring such companies to supply bases, tract for tract, for all their selections made in bulk as had been the practice for many years, *retroactive*, requiring them to submit such basis in *all of their selections theretofore made if it had not been done*. Neither did Secretary Noble in the case of Florida Central & Penn. R. R. Co.

(15 L. D., 529) hesitate to approve and commend this feature of the circular.

Secretary (now Senator) Hoke Smith in his decision in the case of La Bar vs. N. P. R. R. Co. (17 L. D., 406), also required the selections tract for tract and enforced this retroactive circular.

It follows that even if such practice had ever existed, which has never been shown to have been the case, the departmental decision was not sustained by these rulings. But aside from the lack of official evidence of the practice of applying circulars under other "similar" acts as asserted, long after they had been specifically revoked, as we have shown, let us see what the Department has held on the subject of the practice in cases which may be considered as somewhat similar.

The Department in the *Hanson* case (38 L. D., 491) declined to make the circular of November 3, 1909, retroactive on the ground that as it was *not in existence* at the time of the location it would be unfair to apply it. On the other hand, in the case of *State of Idaho* vs. *N. P. Ry. Co.*, 37 L. D., 135, the departmental decision met the claim of the State that the Acts of 1898 and 1899 were similar and that the circular of February 14, 1899, 28 L. D., 103, was applicable to selections under the Act of 1899, by the statement that, "it was issued *prior* to the passage of the Act of 1899 and it is clear the direction therein contained could have no reference thereto."

We thus have one decision holding a circular issued before the act is not applicable for that reason alone, and the other that a later circular was not applicable because issued after date of the act.

It is conceded that no circular was ever issued under the Act of March 2, 1899. And, with the departmental holding that circulars under acts somewhat similar issued before the date of the act, are applicable only to the extent that they appear to justify what is admitted to have been a *bad* practice, and not held to apply to what is admittedly a *very proper* practice, viz., that of giving notice of the selection; and on the other hand holding that a circular issued after the date of the act and the date of the selection does not apply, we are told that the beneficiaries of this private act must be given against bona fide settlers the benefit of, at most, a shady, doubtful admittedly wrong practice, the origin of which, if it ever existed, is so shaded in doubt and uncertainty as that no circular nor decision clearly sustaining it can be produced; without requiring it to comply with the circular which was in existence at the time its selection was made and the favorable language of which has been invoked in the departmental decisions, to sustain the selection.

If an effort had been made to discover instructions which might have been reasonably applied, in the absence of any instructions under this act, it would seem the company and the Land Department would have turned to those issued under the Act of February 26, 1895, "to pro-

vide" for the examination and classification of certain mineral lands in the State of Montana and Idaho, which was procured by the company.

And in the Instructions under the Act dated April 13, 1895 (20 L. D., 350), the Commissioners are instructed as follows:

"Classification shall be made and the minutes of the Board containing the decisions as to the conclusions reached, shall state that the lands classified are examined by legal subdivisions (where the lands have been surveyed), (and where unsurveyed, by tracts of such extent and designated by such natural or artificial boundaries to identify them, as the Commissioners may determine), and give the area thereof."

Again at page 353 in the same Instructions by Secretary Smith, Par. 6, the Commissioners are instructed as follows:

"And thereafter (after examining the surveyed land) shall as rapidly as practicable examine and classify in the same manner all unsurveyed lands in their respective districts within said grants, *observing the difference* that the lands *must necessarily* be described by *natural objects or permanent monuments to identify the same*, returning the area of unsurveyed tracts classed as mineral."

The statute also required that this report should be filed in the office of the Register and Receiver and a duplicate forwarded direct to the Secretary of the Interior and notice given by publication. The same Instructions called especial attention to the fact this classification is final and the Department has held that it is conclusive against the railroad claim. Again, we submit, no difficulty was found in having tracts described by natural objects. This circular was issued April 13, 1895, more than six years before these selections were made.

The railway company was certainly satisfied with this circular, for it procured a provision in the Sundry Civil Act of June 5, 1910, to complete the examination and classification of its lands in Montana and Idaho which were not completed under the Act of 1895. This circular bears date July 26, 1910 (39 L. D., 116), and makes the same requirements as to the description of unsurveyed lands as the circular required under Act of 1895, viz., "*when unsurveyed*, by tracts of such extent, and designated by such natural or artificial boundaries to identify them, as the Examiners may determine, and give the area thereof."

Certainly at these dates a metes and bounds description was the settled practice in the Department.

The latter circular is a joint one signed by Asst. Secretary Pierce, and Director George Otis Smith, of the Geological Survey, and as shown on their face, apply to lands within the grant of this company in the States described.

Notwithstanding their failure in attempting to show the method of selecting was made mandatory and exclusive by the different decisions and regulations relied upon, revoked long before, counsel assumed they had established the fact that the railway company's selection was made in exact compliance with the procedure required by departmental regulations, practice and ruling, and it is contended, it cannot now be overthrown.

We fail to see how it has been shown the selection was made in accordance with any specific procedure, regulation, practice or ruling, but on the contrary we think we have shown it was not. In the leading case in the courts quoted from, viz., James vs. Germania Iron Co., 102 Fed., the rules of practice were relied upon. This is a very different proposition. The Rules of Practice are general and apply alike to all classes of cases coming before the Department. Again, in many of the cases cited and quoted from, a *vested right* had been acquired by compliance with regulations or practice, while in the case at bar no vested right was acquired by filing the selection. At most it was a step preliminary to acquiring such right, depending upon the filing of the new list within ninety days after the plats of survey were filed in the local office.

We believe in all the cases the existence of the rule was in full force, the practice under it was uniform and of long standing and the construction claimed conceded. No dispute about the facts upon which the Department

and the courts were called to pass; while in the case at bar it has been demonstrated by the published decisions of the Department, the regulations upon which counsel rely were not only not applied, and in no sense applicable, as they were based upon statutes requiring essentially different requirements, and in fact, some of them had been *officially revoked prior to the selection.*

Again, many of the cases like that of United States vs. MacDaniel, 7 Pet., 1, which counsel describes as a great leading case on the subject, arose on the validity of the payment of special allowances, paid under a practice or usage which was afterwards abrogated. In such cases there is no probability any rule, regulation, or official order was ever issued, either before or after this case arose. But does counsel think it applicable to the procedure and practice in the Land Department, all of which are steps in the acquisition of title to public lands, and which can have no force unless in pursuance of some specific statutory authority?

In other words, the Land Department has no power whatever to convey away, or in any wise encumber a foot of the public lands, except in pursuance of some positive statute. Counsel insist there is no room for distinction, with respect of the principle declared in the authorities cited, between cases where the rule which was held to protect a claimant was a rule established by express regulation or decision, but built up by custom, usage or practice.

The principle applicable may be the same, but where the facts are not admitted, but disputed, the method of establishing the custom, or practice when no part of any decision, regulation, rule, or any other official sanction, and as stated it is disputed, as in this case, it is very different. When such matters rest wholly in memory, and the assertion is made nearly twenty years after the filing of the list, there is a very broad difference.

And even in case of circulars, like that of May 9, 1899, under Act of June 4, 1897, which was revoked and another circular specifically substituted for it seven months after it was issued, viz., December 18, 1899, both of which are published in the Land Decisions (28 L. D., 521, and 29 L. D., 391), the Department, in the Hanson case, by decision rendered, more than ten years after such revocation and substitution, and in the Daniels case (43 L. D., 381) decided August 3, 1914, nearly fifteen years thereafter, seriously treated this revoked circular as having been in force until November 3, 1909, *more than nine years after it was specifically revoked.*

But counsel are entirely mistaken in their view, of the legal effect to be given the decisions of the Department in such cases. To say they cannot be overthrown is to ignore two well-settled principles the courts apply. As held by Judge Sanborn in the case of James vs. Germania Iron Co., 107 Fed., 597, quoted from by counsel, who, after stating their legal effect, added:

"But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent transfer no title and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

Judge Sanborn, after stating the legal effect of a land patent of the Government, qualifies his broad statement by adding the following:

"But the judgment and conveyance of the Department *do not conclude* the rights of the claimants to the land. They rest in *established principles of law* and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts of each case determines its right decision; and if the officers of the Land Department are *induced to issue a patent to the wrong party by an erroneous view of the law*, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless."

Here is what the court says he may do:

"He may establish his equitable right on two grounds:

"1st. That upon the facts found, conceded, or established, without dispute at the hearing before the Department its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the patent to him. A number of Federal Court cases are cited and the following decisions in this court: Cunningham vs. Ashley (14 How., 377); Bernard's Heirs vs. Ashley's Heirs (18 How., 43); Garland vs. Wynn (20 How., 6); Lytle vs. Arkansas (22 How., 306); Johnson vs. Towsley (13 Wall., 72); Moore vs. Robbins (96 U. S., 530); and Bernier vs. Bernier (147 U. S., 242)."

How strange it is that learned counsel should have entirely overlooked this qualifying or explanatory paragraph following that part of the decision quoted by them!

In the last-above case cited Bernier vs. Bernier, Justice Field, speaking for the court, it was said:

"When a patent for land is issued by mistake, inadvertence, or other cause to parties not entitled to it, they will be declared trustees of the true owner, and decreed to convey the title to him," quoting Stark vs. Stark (73 U. S., 403).

In the case of the Wisconsin Ry. Co. vs. Forsyth, Mr. Justice Brewer, delivering the decision of the court, said, touching this point:

"But further, it is urged that this question of title has been determined in the Land Department adversely to the claim of the plaintiff. This is doubtless

true, but it was so determined, not upon any question of fact, but upon a construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the Land Department. Johnson v. Towsley, 80 U. S., 13 Wall., 72 (20:485); Shepley v. Cowan, 91 U. S., 330 (23:424); Quinby v. Conlan, 104 U. S., 420; Doolan v. Carr, 125 U. S., 618, 624; Lake Superior Ship Canal, R. & I. Co. v. Cunningham, 155 U. S., 354."

But why pursue this argument? Counsel pressed the same position, quoting many of the same authorities in the Circuit Court of Appeals, and also in this court, in the West case (244 U. S., 90). But both courts considered and passed upon the questions which they are still insisting are so concluded by the departmental decision that this court is estopped for lack of jurisdiction to consider them.

There is nothing better settled than that questions of law passed upon by the Department may be reviewed by the courts; and that, even in mixed questions of law and fact, if they can be separated, the questions of law may be considered by the courts.

The courts have universally held that where the facts are all admitted or undisputed, that what is "*reasonable*" within the meaning of any given statute is a question of law for the courts.

"Whether the regulation of a Railroad Company, separating white and colored people and providing separate cars for each race was a reasonable one or

not the facts being admitted, is a question of law for the court."

Chilton vs. St. L. & Iron Mt. R. Co., 19 L. R. A., 269.

"The construction of a written contract where no extrinsic evidence is necessary to explain its terms and also of an oral contract where its terms are admitted is a question of law for the court."

9 Cyc., 591.

Dennis vs. Natl. Bank, 38 Wash., 439; 80 Pac., 764.

"What is a reasonable time to object to items of an account rendered, the dates being clear, is a question of law."

Fleischner vs. Kubli, 25 Pac., 1089.

Standard Oil Co. vs. Van Etten, 107 U. S., 333-334. 27 Law. Ed., 322.

"A police regulation must not extend beyond that reasonable interference which tends to preserve and promote enjoyment generally of those inalienable rights with which all men are endowed, etc. * * * and that whether an act purporting to be within the field of police power is reasonable or not, in the ultimate is a judicial question."

Bonnett vs. Vallier, 116 N. W., 885; 17 L. R. A. N. S., 486-491.

State vs. Redmon, 114 N. W., 137; 14 L. R. A., N. S., 229.

This being true there is no doubt concerning the rights of the court to review the action of the officers of the Land Department in this case.

"Where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. *But if it can be made entirely plain to a court of equity that, on facts about which there is no dispute or reasonable doubt, the officers of the Land Department have, by a mistake of law, deprived a man of his right, it will give relief.*"

Marquez vs. Frisbie, 101 U. S., 473. B. 25 Law. Ed., 800.

Whitcomb vs. White, 214 U. S., 17; Book 53 L. Ed., 891.

But counsel contend at p. 13 of their brief, that even in questions of mixed law and fact, its determination is final and conclusive and not subject to review by the courts citing a number of authorities. The latest case in this court cited is that of *Ross vs. Day* (232 U. S., 110).

While the court in that case went to the extreme limit, in our opinion, yet, we do not understand it supports the broad position of the appellants. It is said:

"But, in our opinion, whether plaintiffs had improved the lands in such sense as to give them a preferential right under the statute was not a mixed question of law and fact. So far as it involved an appreciation of the term 'improvements,' as employed in the statute, it was a question of law; so far as it involved the drawing of correct inferences from the evidence, it was a question of fact. At best, it was a close question, about which reasonable men might differ."

The court then quotes from Whitecomb vs. White (214 U. S., 15) the rule stated in that case, and add:

"And this rule is applied in cases where there is a mixed question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is, quoting Mr. Justice Miller in Marquez vs. Frisbie (101 U. S., 476), as follows:

"'This means, and it is a sound principle, that when there is a mixed question of law and of fact, and the court cannot separate it as to see clearly where the mistake of law is, the decree of the tribunal to which the law has confided the matter is conclusive.'"

In the case of Burfenning vs. Chicago, etc., Ry. Co. (163 U. S., 321), from which counsel quote, at p. 14 of their brief, Mr. Justice Brewer delivering the opinion, after stating the settled rule as to the conclusiveness of their decisions as to facts, continues:

"But it is also equally true that when by Act of Congress a tract of land has been reserved for homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent *transfer no title*, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey any public lands in disregard or defiance thereof."

St. Louis Smelting & Refining Co. vs. Kemp (104 U. S., 636);

Wright vs. Rosebury (121 U. S., 488);

Doolan vs. Carr (125 U. S., 618);

Davis vs. Weibold (139 U. S., 507);

Knight vs. U. S. Land Association (142 U. S., 161).

"The court then quotes at length from the case of Morton vs. Nebraska (88 U. S., 21 Wall., 660) and the case of Texas & P. R. Co. vs. Smith (159 U. S., 66)."

We would also invite attention to the case of Daniels vs. Wagner (237 U. S., 547).

In the well-considered case of Wiggins vs. Burkham (77 U. S., 10 Wall., 129), this court held:

"The proposition that what is reasonable time in such case is a question for the jury, as laid down by the court below, cannot be sustained. Where the facts are clear, it is always a question exclusively for the courts. The point was so ruled by this court in Toland vs. Sprague, 12 Pet., 336. See also Lockwood vs. Thorne, 11 N. Y., 175, and 2 Pars. Cont. Note c 661. Where the proofs are conflicting the question is a mixed one of law and of fact."

In the case of Standard Oil Company vs. Van Etten, 107 U. S., 325, the court held:

"It is next objected by the plaintiff in error, that the court below erred in its rulings upon the account offered and admitted in evidence and which, it was

claimed was a stated account. The claim on this part of the case is, that an account rendered becomes an account stated, unless objected to within a reasonable time; that what constitutes a reasonable time in such a case is a question of law; and that an account stated cannot be impeached except for fraud or mistake, and in support of these propositions, counsel cite Perkins vs. Hart, 11 Wheat., 237; Toland vs. Sprague, 12 Pet., 334; Wiggins vs. Burkham, 77 U. S., 884; Lockwood vs. Thorne, 11 N. Y., 170, and other cases.

"There is no dispute but that this is a correct statement of the law and it is precisely what is charged by the Circuit Court."

The courts have uniformly held that where the facts are all admitted or undisputed, that what is "reasonable" within the meaning of any given statute, is a question of law for the courts. Chilton vs. St. L. & Iron Mt. R. Co., 19 L. R. A., 269; 9 Cyc., 591; Dennis vs. National Bank, 38 Wash., 439; 80 Pac., 764; Fleischner vs. Kubli, 25 Pac., 1089; Bonnett vs. Vallier, 116 N. Y., 885; State vs. Redmond, 114 N. W., 137.

Where there is a mixed question of law and fact, and the court cannot so separate it, as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. But if it can be made entirely plain to a court of equity that, on facts about which there is no dispute or reasonable doubt, the officers of the Land Department have, by a mistake of law, deprived a man of his right, it will give

relief. *Marquez vs. Frisbie*, 101 U. S., 473; *Whitecomb vs. White*, 214 U. S., 17.

In the case at bar, there is no dispute as to the facts and has never been any. It follows that even if the court should hold it is a mixed question of law and fact, there can be no difficulty in separating them and determining whether there has been a mistake of law made upon the admitted facts.

We shall not take up the time of this court in discussing what counsel are pleased to term the reasoning of the Circuit Court of Appeals, in this case, as a "brand new position, which is so extraordinary that it must be stated in the language of the court itself, as nothing else could do justice." The decision speaks for itself and the court needs no defense at our hands. Furthermore, we have already discussed this charge in a former part of this brief and will add nothing further here.

Description in Terms of Future Survey.

How far this court may consider its decision in the West case as finally settling the question that a description of unsurveyed land by the number of the section, township and range, it will be given by the surveyor, as a sufficient description in any case; and if in any, whether it must depend upon the distance from established surveyed lines, the physical conditions presenting obstacles to precisely locating the land in each case, and to a degree whether the land is subject to other selection or to settle-

ment, we are not advised. But, as this is the only case that has been decided by the court, so far as we know, holding such designation a sufficient description, under the conditions existing, we beg to suggest that all of the decisions in that case limit the class of cases to land which is located in proximity to established surveyed corners or lines.

In the decision in the West case, the Department held that such public survey must have been established "*in the vicinity*" of the selected land to make the selection sufficient. The District Court confined it to still narrower limits by holding that such public survey must have been established in the "*immediate vicinity*," the definition of which is equivalent to *adjoining*. The Circuit Court of Appeals laid down what would seem to be a hard and fast rule by saying:

"A description by legal sub-division is a perfectly intelligible designation of a tract of land; so it must follow that a description which will be a legal sub-division when surveyed, if lying *adjoining* a sub-division, already surveyed, is also a perfectly intelligible description."

And even further limited this general rule by adding:

"It may be conceded, in so far as it respects this case, that a description of a section or a quarter section by legal sub-divisions in the fastnesses of the Cascades or Rocky Mountain Ranges, far distant from any Government survey, or even generally, that

a description in terms of future survey, is not such a description as is contemplated by the statute.

"Now, if we move away a step farther from the established survey, and describe the tract to be selected as Section 12, Township 1 North, it would not be a difficult task to set foot on the land and determine accurately its limitations. There would still be a reference back, or a tying back, to Section 36, Township 1 North. But the farther the removal from an established survey, it stands to reason, the greater will be the difficulty of setting foot on the identical tract, *until eventually no reasonable being could expect another to tie back to a known survey for the purpose of identification.*"

In the case at bar they say a removal of $7\frac{1}{2}$ miles is such a distance that no reasonable being could expect another to tie back to a known survey for the purpose of identification.

But that court was led into an error in applying this rule to the West case, by assuming, as stated, that the subdivisional survey of the township would correspond to that north of it and a measurement could be made with approximate accuracy from corner of section 32, to section 20, where the West land was located; when in point of fact, as we demonstrated in this court on appeal, the plats show it did not close on that corner by nearly a quarter of a mile, the corner of section 5, the one immediately south being located that far east of the corner of section 32. Moreover, no account was taken of the lotting on the north side of Tp. 44, R. 3, containing the

West land, the township being "deficient in containing 36 full sections, to the extent of 346.13 acres as shown by the Commissioner's letter, Appendix 'A'."

In none of these decisions, however, has it been held such a description is sufficient *per se*, but all depend upon aids in locating the particular land.

We have been inclined to the view of this question taken by Judge Cushman, in the District Court of South Dakota, April 10, 1913, in the case of Sawyer *et al.* vs. Gray *et al.*, wherein he held:

"The township plat having been filed in April, 1901, the lands in dispute were unsurveyed at the time of the first alleged selection. The Government survey *creates*, not merely *identifies*, sections of land. There were no such lands as those described in the first application at the time of selection in question. U. S. vs. Curtner (CC), 38 Fed. 1; So. Pac. R. Co. vs. Bullingame, 5 L. D. 415 and cases cited; Robinson vs. Forest, 29 Cal. 317; Middleton vs. Low, 30 Cal. 596; Bulock vs. Rouse, 81 Cal. 590, 22 Pac. 919; Smith vs. City of Los Angeles, 158 Cal. 702, 112 Pac. 307."

The case of U. S. vs. Curtner first above cited (38 Fed. 1) was before Mr. Justice Field and Circuit Judge Sawyer for the Circuit Court, northern District of California, and decided February 4, 1889.

In the case of Smith vs. Los Angeles (112 Pac. 307), the Supreme Court of California held:

"Even after a principal meridian and a base line are established and the exterior lines of a township

surveyed, the sections or sub-sections do not have a legal existence, until they are established by an approved survey under authority of Congress."

The case of Bullock vs. Rouse, 81 Cal. 594, held the same as the District Court of South Dakota, that is, that the sections of land are not "ascertained" by the Surveyor but they are "*created.*"

It follows that if this doctrine is sound and we know of no decision to the contrary, the description of land before survey as what particular subdivision it will be when surveyed, describes nothing on earth and must be void for any purpose.

This is in accordance with our contention all through this controversy, viz., that there are only two *possible methods of describing lands*, one by *metes and bounds or natural objects* which is a description *in fact*. The other is a *legal description*, which as held by the Circuit Court of Appeals is perfectly intelligible *after survey* under our system, but there is *no survey*, legally considered, until approval by the Commissioner. This was fully settled by this court, Mr. Justice Hughes delivering the opinion, in the case of U. S. vs. Morrison, 240 U. S., 192, and is one of *law*. Prior to the approval of the survey there can be no description of land possible except by metes and bounds or natural objects. There can be no question, therefore, that the selection in this case is *absolutely void because it describes nothing in existence.*

In Central Pacific Railroad Company vs. Nevada, 162 U. S., 512, Mr. Justice Brown speaking for the court, used the following language:

"The lands granted to the railroad company were the odd numbered sections within the limits of 20 miles on each side of the railroad, except such as had been sold or otherwise disposed of by the United States or to which a homestead or pre-emption claim had attached, or mineral lands.

"Until the surveys were made it cannot be known what part of the lands are within the enumerated exceptions, or what sections or parts of sections will belong to the company, nor until then can the locality of the lands be determined so that a description may identify them.

"It must be borne in mind that the unsurveyed lands are not described by metes and bounds or by common designation or name but as sections and parts of sections, and, as alleged by the complaint as their designation will appear when the surveys of the United States are extended over them. It is plain that this is not a description by which the identity of the land can be established, and is equally plain that possession of the lands cannot be established until the surveys are made."

In a suit by the Bird Timber Company vs. Snohomish County *et al.* to cancel taxes levied against the company for the years 1912 and prior years, the Supreme Court of the State of Washington (81 Wash. 416-143, Pac. 433), in a selection under the Act of June 4, 1897, held as follows:

"In the first place, we think the description of the property contained in the selection (in the terms of a future survey) is insufficient to designate any specific tract of property. At the time the selections were made there were not, nor is there now, any specific tract of land marked on the ground which can be located by the descriptions contained in the selections. It may be that in course of time the Government will survey certain lands, and denote them in the surveys in accordance with the descriptions in the selections contained in the Hayes selections; but it is reasonably certain it will not designate any tract in accordance with the description contained in the Goldberg selection.

"This tract, if the present system of surveys is pursued, will border on a township line, and will in all probability be fractional in quantity, in which case it will be designated in fact by lots numbered instead of the general description contained in the selection.

"But be this as it may, *there is no means of ascertaining prior to the actual Government survey, what specific tracts of land will be included in the description.*

"They (the words 'there be and is hereby granted') vests a present title, though a survey of the lands and location of the road are necessary to give precision to it, and attach it to any particular tract * * * until the identification of the even and odd-numbered sections the United States retained a special interest in the property at least, etc. * * * It was error, therefore, in the trial court to admit the survey made by Ashley."

As also bearing upon this point this court in the case of U. S. vs. Morrison (240 U. S., 192), involving the question whether prior to survey, Congress could make other disposition of the 16th and 36th sections theretofore granted to the State of Oregon, Mr. Justice Hughes speaking for the court among other things, said:

"Prior to survey, the designated sections were undefined and the lands were unidentified."

After stating that the people were not interested in getting the identical 16th and 36th sections is was said:

"Indeed, *it could not be known* until after a survey where they would fall."

Again—

"Until the status of the lands was fixed by a survey, and *they were capable of identification*, Congress reserved absolute power over them * * * the State was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years and Congress was left free to legislate touching the national domain in any way it saw fit to promote the public interests."

On the point of the impossibility of identifying land before surveys, the Supreme Court of Idaho, in the case of Rogers vs. Hawley (115 Pac., 687), in giving the reasons

for exchanging the 16th and 36th section in a forest reserve for surveyed lands outside, stated:

"Under the rule adopted by the Supreme Court of the United States in U. S. vs. Montana Lumber and Mfg. Co., 196 U. S., 573, and followed by this court and other courts. Azeuenaga Bros. Live Stock & Land Company vs. Cortt (115 Pac., 18); Clemmons vs. Gillette, 33 Mon., 321; 83 Pac., 879, and U. S. vs. Burdeye, 137 Fed., 70; C. C. A., 100, there is no method whereby the State can identify an unsurveyed section of the public domain, and no evidence would be admissible to identify a school section until after the Government survey has been made. In the absence of any means of locating the section on the ground and identifying it, the State cannot lease the land to anyone and can consequently, realize no profit or income from any unsurveyed section."

The case of the U. S. vs. Montana Lumber Co., 196 U. S., 573, referred to by the Supreme Court of Idaho, *supra*, was an action in trespass against the Railway Company for cutting timber on the land prior to survey. The company claimed that by a private survey made by it, the land in question was shown to be an odd-numbered section which belonged to the company under its grant, and therefore it could not be liable for trespass in cutting timber on the land granted to it. This court, Mr. Justice McKenna, speaking for the court, said:

"The survey of the land is left to the Government; in others words, the identification of the sections — whether odd or even, is reserved to the Government."

Again, he quoted approvingly from the decision in the case of Leavenworth L. & G. R. Co., 92 U. S., 733, as follows:

As to when a survey is complete it was said:

"It necessarily follows that the making of a survey and its approval by the Surveyor General of Oregon, did not make the survey complete as an official act. It still remained subject to the examination and approval of the Commissioner. * * * If title passes upon survey, it must be upon the survey duly completed according to the authorized regulations of the Department."

If, therefore, the State of Idaho, as held by her Supreme Court, and the State of Oregon, as held by this court, with all their great power and resources, were unable to identify the 16th and 36th sections granted to them, how, we may ask, is what the district court in the West case held to be the "land-hungry" homestead claimant, without means, perhaps, living in a tent and carrying his supplies sixty to seventy-five miles on his back, as was the case with most of the settlers in this vicinity, "to identify the tract, the company has selected without furnishing him a more definite means of identification than Congress furnished these States in their grant?

These decisions also completely overthrow the doctrine that a tract might be identified if in the vicinity of a surveyed line, for section 36 is always the southeast corner of a township, which corner is the one from which, under

the manual of surveying the survey is always commenced in the absence of special instructions to the contrary.

Instead of such a description being "reasonably certain" as required by the law, it is *most unreasonably uncertain*.

Again, in the case of F. A. Hyde *et al.*, decided October 6, 1911 (40 L. D., 284), under Secretary Fisher's administration, after a very thorough consideration of the question of such a description under the Act of June 4, 1897, which did not require the strict description required by the Act of 1899, it was held it was insufficient and that the land could not be *sufficiently identified* for anyone to make an affidavit that it was "unoccupied" as required by the statute. It follows that there has not been a uniform construction of the statute. The decision of the Hyde case remained the settled doctrine of the Department from October 6, 1911, until changed August 3, 1914, in the Daniels' case, 43 L. D., 381.

The selection by the company in this case is neither a description in fact nor one in law. In point of fact it does not purport to be a *description* of land. It is only a designation of a certain number which some unknown quantity of land may bear after the official survey which is based upon a marking on the ground. It is what Assistant Secretary Jones described as an "*expected or hypothetical description*," 42 L. D., 259.

We do not believe that we can express with as much force and accuracy as did First Asst. Secretary Adams in his letter to the Commissioner, the grounds of the insuffi-

ciency of the description of lands in terms of a future survey. We therefore at the expense of repetition quote as follows:

"To describe a tract of land as what will be, when surveyed, a certain parcel of the public domain is certainly indefinite. It means nothing except that in such case the selector thereby expects to initiate a preference claim to land somewhere without giving notice to other persons who may wish to make an appropriation under the same or other laws, and who, after he has gone upon the public domain, in pursuance of such lawful design and marked his claim and perhaps cultivated and improved it, may be awakened years thereafter to find that it is lost to him by reason of a prior appropriation of which he had no notice either in law or in fact. The proposition, therefore, seems to lead to a preposterous result, and in my opinion cannot be entertained.

"In conclusion I have to say that in the study of the various Acts of Congress above mentioned, I was profoundly impressed with the thought that while they permitted and authorized the initiation of claims to unsurveyed lands, they all evidently contemplated that such lands should be identified in some appropriate and effective way. There is nothing in any of these acts justifying another conclusion. If, in the administration of these laws, *it has been assumed that identification would be accomplished by such description as is now contended for on the ground of precedent, such assumption was unwarranted.*"

But even if sufficient under other statutes, it seems to us if we follow the rules of construction of acts of Congress laid down by standard authorities and of this court is followed, it would seem impossible to so construe this act as to permit such a description. Sutherland on Statutory Construction, 2d Ed., says:

"The intent of the statute is the law."

"To find out the intent is the object of all interpretations" (Sec. 364).

"Intent first to be sought in language of statute itself" (Sec. 366).

"If the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framer of the instrument, there is no occasion to resort to other means of interpretation. The statute itself furnishes the best means of its own exposition" (Sec. 366).

In the case of *Lake County vs. Rollins*, 130 U. S., 70, the Supreme Court said:

"Where the law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

In *Lewis vs. The United States*, 92 U. S., 21, the court said:

"When the language of the statute is transparent, and its meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe."

In the case of *Platt vs. Union Pac. R. Co.*, 99 U. S., 558, this court said:

"Congress is not to be presumed to have used words for no purpose."

"The admitted rules of construction declare that a legislature is presumed to have used no superfluous words."

It also held:

"Statutes should be so construed, if practicable, that *one section will not defeat or destroy another, but explain and support it.*" Justice Field in *Burrier vs. Burrier* (147 U. S., 242).

"*Every clause in a statute should have effect, and one portion should not be placed in antagonism to another.*" *United States vs. Lanham* (118 U. S., 85).

Applying these settled rules to the statute in question it is *absolutely impossible* to harmonize the requirement of the filing of a new list after survey to conform thereto, and finally if this list does not precisely correspond with the survey the company is permitted to further conform it, with a description of a certain section, town and range. We have seen it has long been held by the courts that there is no such thing in existence as sections, townships

and ranges before approval of the survey, but that they are created by the survey. It follows such description designates nothing then in existence. Furthermore, a conformation is impossible unless the lines are marked on the ground, for the land marked on the ground by the surveyor which corresponds with the member selected must necessarily be the exact land selected and no other land could by any possibility be substituted for it under the guise of conformation, as might be the case under a metes and bounds or natural objects description, as is frequently the case when settlers mark out the boundaries of their claims and post notices. Therefore, aside from every other consideration the act on its face contemplated a metes and bounds or natural object description as surely as if it had been required in so many words; and to give each clause its effect, which is certainly practicable and has been required by the courts, it must be so held.

The learned Circuit Court of Appeals contrasts these provisions with the requirements under the Act of 1898, and very properly held Congress in the enactment by the Act of 1899, determined to abandon and did abandon the description required in that act, and required one of "reasonable certainty," which, if it means anything, it must have been such as to put others on notice of the locus of the claim. The fallacy of the argument in support of such a description loses sight of the fact that the purpose of Congress in requiring such a description as would designate the land with reasonable certainty was

not for the benefit of the company alone, for if no one else could initiate a claim to the land it would be in a sense immaterial—at least a question between the company and the Government only. But when it is considered that homestead settlers had a right to settle on the land under the Act of 1880 and mark out their claim on the ground, settle and reside upon it; the State of Idaho had a right to request its survey under the Act of 1894, as was done in this case, forest lieu land selectors and perhaps others had a right to initiate claims to the land, it is plain Congress did not intend to place them at the mercy of the railway company by placing upon them the burden of making a survey, not to find the land they wanted, but to find what they must "keep off of," as it had been selected without anything to indicate its locus. And even then the best of surveyors could not have located the claims of the company with any degree of accuracy—admittedly if not "*adjoining*" or in the "*immediate vicinity*" of an established line of survey. It seems to us no sane person could imagine Congress could have intended to put such a burden upon the settlers, who, as held in *Lyttle vs. Arkansas, supra*, this court held "national legislation had for many years treated tenderly." Whatever may be held, we shall never believe this was contemplated by that body. We hardly think counsel could have been serious when at page 26 of this brief they say:

"This would have been just as easy (a metes and bounds description), and just as practicable for the

railway company to do so at the time of selection—had it been required. * * * Such a description would have been not merely 'reasonably certain,' it would have been mathematically certain. * * * Yet such a description would have meant no more, for any practical purpose, would have furnished no more information and would have made the land no easier to identify than the description which was prescribed by the Department and used in the selection."

Counsel here not only states a proposition which upon its face looks unreasonable, but controverts the position of the Department in the Hanson case, *supra*, upon which they have been wont to rely.

And the trial court in its decision in the West case said:

"The argument rests wholly upon the assumption that if the method (in terms of future survey) is authorized at all, it is exclusive; but such an assumption is plainly unwarranted. The act does not purport to require any given form of description, but upon the other hand gives the widest latitude; its only requirement is that on the selection list the lands shall be designated with 'reasonable degree of certainty'; the method of designation is immaterial, provided it identifies the land. It was doubtless anticipated that different methods would be employed, as the provision above quoted was intended to point out the course to be pursued in cases where the *original description is not tied to the lines of an official survey, as here.*'"

And in the Daniels case, *supra*, wherein it is said:

"The metes and bounds description of unsurveyed land *should always have been*, as it *now is*, required."

There are only two possible descriptions of land, viz., one by marking on the ground or by reference to natural objects, which is a *description in fact*, and the other a *description in law*. In the last analysis there is only one, as a description in law presupposes and is based upon a marking on the ground. That is, a *legal survey*. In public lands it is a description in law *only* after the approval of the survey by the Commissioner. Anything else is no description and no designation. F. A. Hyde *et al.*, 40 L. D., 284, citing U. S. vs. Montana Lumber Co., 196 U. S., 573.

II.

LAND NOT SUBJECT TO THE SELECTION OF THE COMPANY.

Was Reserved by Act August 18, 1894 (28 Sp., 394), from Any Adverse Appropriation, by the Filing of the State's Application for Survey of the Land, Prior to the Selection.

The District Court decided against our contention upon this point, and the Circuit Court of Appeals having sustained our claim that the land was not designated with a reasonable degree of certainty, as required by the act, did not consider it, but reversed the decision upon the

one point. Counsel in their appeal and brief take issue with our contention, and endeavor to sustain the action of the trial court. While we feel quite confident the action of the Circuit Court of Appeals will be affirmed by this court, yet we shall urge, briefly as may be, the grounds upon which we base our position.

We have no fault to find with the analysis of the act in question made by counsel at page 112 of their brief.

As said by Story, Justice in *The Margaret, alias Fernando* (9 Wheat., 424) :

"What the policy of the act is can be known only by its provisions."

And, as said by Chief Justice Marshall in *Pennington vs. Coxe* (2 Cranch., 52) :

"The law is the best expositor of itself."

Let us see, therefore, what are the provisions of the law.

The Act of August 18, 1894, authorizes the governors of certain mentioned States, including Idaho, to "apply to the Commissioner of the General Land Office for the survey of any township or townships of public land remaining unsurveyed, etc., with a view to satisfy the public land grants made by the acts admitting such States. And upon the application the Commissioner shall proceed to immediately notify the Surveyor-General of the applica-

tion made for the withdrawal of said lands; and the lands that may be found to fall within the limits of such townships, as ascertained by the survey, "*Shall be reserved upon the filing of the application for survey* from any adverse appropriation settlement or otherwise until the expiration of sixty days from date of filing township plat, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim and such as may remain unselected at the expiration of that period, and not otherwise appropriated according to law, "*Shall be subject to disposal under general laws as other public lands.*"

Whether the filing in this case by the Governor with the Surveyor-General of the State, and its transmittal by him to the Commission was contemplated or not, is entirely immaterial, for the reason that it is not disputed; the record shows it was received by the latter official at a date prior to the date of the filing in the local office of the company's selection, to wit, July 15, 1901. *Northern Pacific Railway Co. vs. State of Idaho et al.* (39 L. D., 503, at 588). The real question is, whether the land was immediately withdrawn by virtue of the positive words of the statute, which are, that it "*shall*" be reserved upon the filing of the application, not only from the claims of the company, but from *any* adverse appropriation by settlement, or otherwise. This was intentionally made so broad as to *cut off possible claims*, except that of the State. Otherwise it would have been of no practical benefit to such State. It seems to us, unless we ignore the

plain, positive, unambiguous words of the statute, in line with the former efforts of Congress to protect the States in the grants made to them, which this act undertook to remedy, for the sole purpose of preventing *from the day of filing the application with the Commissioner* the attachment of *any* claim to the land within the township for sixty days after official survey, and if selected within that time it stood as a valid State selection without any action of the Commisioner or any other official. All the other things required of the State or the Commissioner looked solely and only to the giving notice to the public of the State's claim, but no part of it could by any possibility defeat the positive language of the statute which immediately reserved it from all forms of appropriation. Such being the evident intention of Congress, the exact language of the statute, it must be upheld by the courts.

The position of the appellants, as stated, is, that the question whether a valid application for survey becomes effective before selection by the railway company on July 23, 1901; and if so, it will be necessary to determine whether this application resulted in an absolute reservation, or withdrawal of the land, so that no rights attached under the railway company's selection, notwithstanding the State failed to make a valid selection of the land and did not require any rights therein.

Following this, in a way which seems to be quite usual in their brief, it is asserted "both these questions have been determined adversely to our theory by" *numerous decisions* of the Land Department, "as well as by the

District Court in the case at bar." No decisions of the Land Department are cited. Possibly their statement which follows may account for this, for they say, "the facts with respect to the application fo rsurvey are somewhat complicated, and there are some inconsistencies in the earlier decisions of the Department which tend to confusion." They might have added in practically all of them, both earlier and later, except the thoroughly considered case of the Railway Company vs. The State of Idaho (39 L. D., 583), decided March 20, 1911, which recites all of the objections of the company and decided in favor of the State and directed the cancellation of the selection lists embraced in said decision. But counsel very conveniently got rid of this thorough consideration of the identical questions involved in the case at bar, in which they were considered from any angle, even the able attorneys of the company could present against the State's claim, by asserting without any reference to specific decisions, that in this "one case, and one only, is a contrary view expressed. But that case stands alone and unsupported; it is inconsistent with all other prior and subsequent departmental decisions on the subject (of which there are many), and it has since been expressly overruled and repudiated." If this decision has been expressly overruled and repudiated, as asserted, it would seem counsel would have given a specific reference to where such decision, or decisions, may be found. In the absence of such information we have made a careful examination of the cases overruled or modified published

in each volume of the Land Decisions from the 29th to and including the 46th, or last one published, and find it is not reported by the Department as having been either overruled or modified.

In our reply brief in the Circuit Court of Appeals it was specifically stated that this decision was followed in the case of Carrie E. Shearer vs. Northern Pacific Ry. Co., decided March 5, 1913, two years thereafter (not reported).

In the Shearer case, the Commissioner, discussing this same application of the State of Idaho, and the right of the homesteader as against the attempted selection on the part of the Railway Company under the Act of March 2, 1899, being a case raising the identical questions raised in the case at bar, said:

"Subsequently, instructions were requested of the Department as to the State's said application, list No. 9, with others, and the company's selections in conflict therewith, and acting under departmental instructions of March 20, 1911 (39 L. D., 583), this office, on May 8, 1911, rejected the State's application list No. 9, with others, for University purposes, as excess selections.

"Said departmental instructions directed this office, in consideration of the settlement claim, to reject such as are based upon settlement made subsequent to July 31, 1905, the date the company filed the additional list, adjusting the selection to the public survey, and stated that as to settlements made prior to that date, and made in good faith, by a qualified

homesteader and since maintained in accordance with law, priority would be accorded, and, upon allowance of entry for lands so settled upon, the company's selections would, to that extent, stand rejected."

Counsel attempt to distinguish the application of the State of Idaho for survey, from all other methods or attempts to appropriate public lands, and claim that this particular method of appropriation does not initiate a claim to the land, and hence does not except these lands from lands which the appellants were entitled to enter. In other words, they claim that the appellants might file their application to select this land subject to the prior and superior rights of the State to appropriate it. This is contrary to the view expressed by the courts in numerous cases.

In the case of McIntyre vs. Roeschlaub, 37 Fed., 556, a homestead entry was made on the land in question by one who was an alien and not entitled to enter any land under the homestead laws. The successor of the railway company in that case contended that the attempt to enter the land under the homestead laws having been made by an alien it was void, and therefore no right or claim attached to the land. In disposing of that question, the court said:

"Within the reasoning of that case, I think the contention of the complainants cannot be sustained. So far as the records of the Land Office disclose, a proper homestead entry had attached. The Govern-

ment had accepted the filing of the entry by Mary Hooper. Whether it should afterwards permit that entry to ripen into a perfect title, or should challenge her right to perfect the entry, were matters resting solely in the discretion of the Government. The right to inquire into the validity of the proceedings in the Land Office, regular in form, was not granted to the railroad company. Such right of inquiry remained personal to the Government. It occupied the position, not of a vendor, but of a donor. It limited its gifts to lands to which a homestead right had not attached. Whenever it accepted a homestead entry, its acceptance removed the land from the terms of the grant. What should become of the matter thereafter as between the person making the entry and the Government was a matter that did not affect the railway company. It had no right to inquire. The Government might have waived all the informalities and defects in the person, or in the occupation, and issued its patent. Whether it did or not was a matter of which the railroad company could not complain. It was enough for it, that upon the face of the records there was an apparently valid homestead entry, one which the Government recognized, and one which it might finally permit to ripen into a perfect title. The homestead claim, whether good or bad, in the language of the act, '*attached*'; and that is all the railroad company could inquire into. That being settled, the land did not pass under this grant."

The case in 39 L. D., 583, decided March 20, 1911, specifically held:

"Selections by the Northern Pacific Railway Company under the Act of March 2, 1899, proffered subsequent to the application of the State for survey of the lands under the Act of August 18, 1894, and while the lands were reserved from appropriation adverse to the State, are not, upon rejection of the subsequent application by the State, entitled to recognition as of the date of presentation, to the prejudice of the rights of settlers."

The Commissioner was then instructed, as stated in the Shearer case, that "in the consideration of settlement claims your office will reject such as are based upon settlement made subsequently to July 31, 1905. As to such settlements as may have been begun prior to that date, if made in good faith by a qualified homesteader, and since maintained in accordance with law, priority will be accorded, and upon allowance of entry for the lands, etc., settled upon the company's said selections, will, to that extent, stand rejected." * * * After the adjustment of these claims clear lists of the company's said selections will be forwarded for the approval of the Secretary of the Interior unless objection arises not herein considered.

Again, more than ten years after the State's application and that of the company were filed in the case of Thorpe *et al.* vs. State of Idaho (42 L. D., 15), decided March 22, 1913, the Department, after a full consideration of the decision of the Supreme Court of Idaho, in the case of Rogers vs. Hawley *et al.* (115 Pae., 687) and the confirmatory statute of 1911, said:

"This Department has never had any doubt as to the validity of these selections (of the State). Its concern was because of the seeming declaration of invalidity pronounced by the court. * * * This difficulty has now been removed and it is not material whether the court changed its mind upon the question or whether the invalidity suggested by the court in the first instance has been cured by legislation. In either case no good reason exists why said departmental decisions should not be carried into effect. They are therefore hereby reaffirmed and the necessary steps will be taken to put them into effect. In the adjustment of the State's grant, however, under those decisions due regard will be had for the State's wishes in the matter of the protection of such equitable claims as may be, or have been, preferred by settlers who were misled by the failure of the Commissioner of the General Land Office to cause to be noted said withdrawals upon the records of the local Land Office."

A year thereafter, to wit, March 10, 1914, the Department in the case of Thorpe *et al.* vs. State of Idaho (43 L. D., 168) saw a new light and not only had doubt, but held it had been wrong from the beginning and reversed former decisions in conflict with that, holding, in effect, the Commissioner not only had the power to reject the State's application for survey, but did reject it. However, like counsel in the case at bar, failed to refer to any such decision, or make any explanation as to how this fact had been first discovered thirteen years after it is

alleged to have taken place, nor to the decision in 42 L. D., 15, just a year before, wherein it said: "*The Department never had any doubt as to the validity of these elections.*"

This is certainly a very unsatisfactory decision from every point of view.

Claim of the State, the Railway Company and of Delany.

On July 15, 1901, the Governor of the State of Idaho made application for survey under the Act of August 18, 1894.

On July 23, 1901, the Northern Pacific Railway Company filed lieu selection list No. 71 under the Act of March 2, 1899.

On June 21, 1903, Delany settled on this land in suit.

On June 4, 1909, official survey was made and filed in the Local Land Office.

On June 10, 1909, Delany made application for homestead entry.

The record in this case shows that Delany's homestead application was rejected by the Local Land Office on August 31, 1909, for the reason, "that the same is all in conflict with the selection by the State of Idaho" (Record, p. 115). Delany appealed from the decision of the Local Land Office, and on December 16, 1909, the Commissioner of the General Land Office affirmed the decision of the Local Land Office, saying in part:

"It appears, however, that said T. 43, N. R. 4, E., with a number of others was withdrawn from settlement or other appropriation adverse to the State,

under date of July 5, 1901, upon application of the Governor of Idaho, under the Act of August 18, 1894 (28 Stats., 394). The language of the statute is in part as follows:

"And the lands that may be found to fall in the limits of such townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise, except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office."

"Unless, therefore, it could be shown that you were a settler on said N.E. $\frac{1}{4}$ of Sec. 20, prior to the date of the application for the withdrawal by the Governor, the State's right to said tract, under its indemnity selection, is superior to yours, and since it appears that at the date of your application, said tract was covered by the State's list, your application was properly rejected by the local officers.

"Very respectfully,

"Fred Dennett, Commissioner."

On March 20, 1911, First Assistant Secretary of the Interior in reviewing the law of this case, and having under consideration the identical question above referred to, said:

"A sufficient answer to this contention is that for the purposes of this case, it is immaterial that the Commissioner of the General Land Office refused

to "withdraw" these lands. By the terms of the Act of August 18, 1894, *supra*, under which the application for survey was made, the withdrawal became effective and was an accomplished fact upon the perfection of the application and while it remained for the Commissioner of the General Land Office to give notice of the withdrawal, the failure of that officer to do so did not defeat it. *The withdrawal was statutory and in nowise depended on the discretion of the Commissioner of the General Land Office* (*Thorpe et al. vs. State of Idaho*, 35 L. D., 640). This being true, and *the lands being withdrawn for a special purpose, they were not subject to selection by the railway company*, and this is true without regard to the question whether the State had previously apparently selected an excess of land to satisfy its grants.¹

"*This office considered the company's selections as invalid when made because the lands applied for were withdrawn for the State under the Act of August 18, 1894, supra*, that the departmental decision on review was determinative of the company's claim to the lands in question and that the fact of the applications to select presented by the State being in excess of the area required to satisfy its grants in no manner cured the invalidity of such selections.

"Under this view of the matter, I am of the opinion the order of suspension of November 20, 1908, should be revoked, *the company's selections canceled, and the case closed as to the company.*" * * *

"It is urged on behalf of the company, in substance: * * * (2) That, admitting for the sake

of the argument, though not conceding, that the State by its application for survey secured a preference right to select said lands in accordance with the provisions of the Act of 1894, yet, if the State's selections failed for any cause other than defective application for survey, under well-settled rulings of the Land Department, the company's right would attach as of the date of its selections, and that it would be entitled to priority over claims of any character subsequently initiated.

"The prior adjudications in this case have proceeded upon the assumption that the State's application for survey of these townships was regularly filed, and that there was due compliance on its part with every essential requirement of law, the questions heretofore raised going to alleged failure of the Commissioner of the General Land Office to 'withdraw' the land upon such sufficient application and the question of legality of a withdrawal of lands admittedly largely in excess of the State's grant for all purposes. The *questions so considered were decided in favor of the State and those questions will not be reopened.*

"The law necessarily contemplated a withdrawal or reservation of more lands than were necessary to satisfy the State's grants, and the failure of the Commissioner of the General Land Office to issue an order of withdrawal in further assurance of the legislative intention, could not jeopardize such right as was accorded the State by said act. * * *

"There thus remains only the further contention that when the State's selections failed the rights of

the company attached as of the date of presentation of its lists. There is something in this argument, but not so much as is claimed for it. It has never been held by this Department in a case where the State made its selections under the Act of 1894 and in attempted exercise of its preference right, that upon the rejection of such selections intervening adverse claims for the same lands would be recognized as of the date proffered. *Specifically, it has surely never been held that proffered selections by a railway company, under any law, for lands covered by a valid application for survey under the Act of 1894, secured any legal rights whatever.* This act provides that such lands shall be 'reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office.'

"Now, at the date these railway lists were filed these lands *were reserved from appropriation adverse to the State.* No legal rights could, therefore, have attached under such filing. The State afterwards selected the land and thereafter the question of its right thereto was one between it and the Government, and that question was not complicated by the filing of intervening adverse claims, even though same were filed pursuant to and received in accordance with subsisting administrative policy. The contention made involves the consequence that in in-

stances where, after the State's application for the survey of the township under the Act of 1894, shall have been defeated by placing the lands in a national forest, still the railway claim would not be defeated by the creation of such national forest, and, therefore, by indirection, the superior claim of the State would be defeated by the inferior one of the company. Such a consequence would be wholly unfair, was not contemplated, and can not be tolerated.

"If, as matter of administration, and for the preservation of equities, the Land Department should determine to recognize priority in the initiation of these claims, inasmuch as it has permitted the filing thereof while the lands were so reserved for a special purpose, upon the failure of such purpose it is believed this could legally be done, but while not fully advised of the situation with such minuteness as is desirable, enough of it is known to justify the conclusion that some of *this land is covered by the claims of settlers* and such claims, initiated as they probably were, in the belief that the State's preference right might not be asserted or might for other reason fail as to the lands settled upon, are, *under uniform rulings of the Land Department and the courts, entitled to the first consideration.*

"In the adjustment of the equities of settler-claimants, the question of good faith in the initiation and maintenance of such claims is of primary importance. The company's said lists, Nos. 133 and 135, embrace selections of unsurveyed lands, and it having been determined under the circumstances of this case that such *selections initiated no legal right,*

it follows that the filing thereof was not the assertion of such claim as would prevent a settler from acquiring equities which it is the purpose of this adjustment to protect. But after the filing of the townships plats of surveys and on July 31, 1905, which was within the time allowed by law, the company filed its additional list adjusting these selections to the lines of the public surveys. *These additional filings gave precision to the company's claim and such notice thereof to the public as would prevent the initiation of rights by settlement thereafter upon the lands so selected.* This being true, in the consideration of settlement claims your office will reject such as are based upon settlement made subsequently to July 31, 1905. As to such settlement as may have been begun prior to that date, if made in good faith by a qualified homesteader, and since maintained in accordance with law, priority will be accorded, and upon the allowance of entry for the lands so settled upon the company's selection will to that extent stand rejected.

"If entries of any sort have been inadvertently or mistakenly allowed for any of these lands, they will rest on the same basis as settlement claims, and if they do not fall within the rule above laid down for the adjustment of such claims, they will be canceled. After the adjustment of these claims clear lists of the company's said selections will be forwarded for the approval of the Secretary of the Interior unless objection arises not herein considered." (The italics are ours.)

N. P. Ry. Company vs. State of Idaho et al., 39 L. D., 583.

Thus we see that from June, 1903, to March, 1911, or during the first eight years of Delany's settlement and homestead entry, his contest was with the State of Idaho, with the State winning at every turn. That is, during this period the claim of the State was upheld by the Land Department as superior to that of the settler. The claim of the Railway Company received little attention, and we see that whenever the Land Department considered the claim of the Railway Company it was flatly rejected apparently being considered worthy of but little attention.

But later on and on June 28, 1915, the State of Idaho having satisfied its entire grant, its application of July 5, 1901, was rejected and dismissed, and the contest then became one between Delany and the Railway Company, and on July 9, 1915, Delany's homestead application was held for rejection on the ground that it conflicted with the selection of the Northern Pacific Railway Company.

It is very interesting to note that this decision of July 9, 1915, by the Assistant Commissioner of the General Land Office rejecting Delany's homestead entry and sustaining the selection of the Northern Pacific Railway Company is based upon Delany's letter of appeal dated November 15, 1909, which appeal was decided by the Commissioner of the General Land Office on this same letter of appeal, on December 16, 1909.

On December 16, 1909, the Commissioner of the General Land Office in disposing of Delany's letter of appeal, held that the appeal should be dismissed, because the State's right to the tract was superior to that of Delany's (see Record, p. 115).

On July 9, 1915, the Assistant Commissioner of the General Land Office again deciding Delany's appeal based on his letter of appeal dated November 15, 1909, without any motion for re-hearing made on the part of Delany, and without any notice to Delany of such action, and in total disregard of the former decision on this appeal, dismissed his application upon the ground that it was in conflict with the selection of the Northern Pacific Railway Company.

Under the decisions of the Land Department effecting the land involved in this controversy from a time prior to the time the Northern Pacific Railway Company attempted to initiate any claim to these lands, to July 9, 1915, these lands were "*Reserved from any adverse appropriation by settlement or otherwise,*" in accordance with the exact language of the Act of August 18, 1894, Section 1 of which said Act being as follows:

"That it shall be lawful for the Governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota and Wyoming to apply to the Commissioner of the General Land Office for the survey of any township or townships of public lands then remaining unsurveyed in any of the several surveying districts, with a view to satisfying the public land grants made by the several acts admitting the said States into the Union, to the extent of the full quantity of land called for thereby; and upon the application of said governors, the Commissioner of the General Land Office shall proceed to immedi-

ately notify the Surveyor-General of the application made by the Governor of any of said States for the withdrawal of said land, and the Surveyor General shall proceed to have the survey or surveys so applied for made, as in the case of survey of public lands; and the lands that may be found to fall within the limits of such township or townships as ascertained by the survey, shall be *reserved upon the filing of application for survey from any adverse appropriation by settlement or otherwise*, excepting as to those rights that may be found to exist of prior inception for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of township plat of survey," etc.

Act of August 18, 1894, Federal Statutes Annotated, Vol. 6, page 374.

Hence the Railway Company could acquire no rights by the filing of its lieu selection list on July 21, 1901.

But in addition to the provisions of the Act of August 18, 1894, the Act of March 2, 1899, under which the railway company makes its claim, provides that the company may select only "*Public lands * * * not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection.*" Act of March 2, 1899, Sec. 3.

This language has been construed many times by the courts and at the time of the settlement of Delany, at the time of the filing of lieu selection list No. 71 by the Northern Pacific Railway Company, and at the time of filing its application by the State of Idaho under the Act of August

18, 1894, the rule of decision in all of the Federal Courts applicable to the case at bar, was that the Northern Pacific Railway Company by its attempted selection acquired no right whatever, and that the prior and superior right to the land under the facts shown, was in Belden M. Delany.

We ask the Court to consider only a few of them.

The Company was authorized to select only "*Public Land.*"

"By public land is meant such land as is open to sale or other disposition under general laws: land to which any claims or rights of others have attached does not fall within the designation of public land."

Barden vs. Northern Pacific R. Co., 145 U. S., 538; 36 L. Ed., 806;

Northern Pac. R. Co. vs. Hinchman, 53 Fed., 526;

Northern Pac. R. Co. vs. Musser Sauntry Land, etc., Co., 68 Fed., 1000;

U. S. vs. Oregon, etc., R. R. Co., 69 Fed., 901;

Southern Pacific Ry. Co. vs. Brown, 75 Fed., 90.

Again, the Act of March 2nd, 1899, provides that the railway company may select only lands which are "*not Reserved.*" These lands were reserved according to the decisions of the Land Department, and also by the express provisions of the Act of August 18, 1894, as we have already seen.

Again—The railway company could only select lands "*To which no adverse right or claim shall have attached or have been initiated at the time of making such selection.*"

"It is not the *validity of any claim, but the fact that such claim was made*, that excludes the land from the category of public lands within the meaning of the act in suit granting the right to select public lands."

S. P. Ry. Co. vs. Brown, 75 Fed., 90;
McIntyre vs. Roeschlaub, 37 Fed. Rep., 556.

If the lands were excepted from the lands which the company were authorized to select as lieu lands *at the time of the attempted selection*, subsequent abandonment by the State restored the lands to the public domain, but no rights passed to the railroad company.

Kansas Pac. Ry. Co. vs. Dummeyer, 113 U. S., 629;
Hasings and Dakota R. Co. vs. Whitney, 132 U. S., 357.

The foregoing authorities hold in principle, that the application of the State of Idaho, *reserved the land*. That this application of the State was the *initiation of a claim within the meaning of the Act of March 2, 1899, and for that reason the land was not open to selection by the railway company*. Hence it must appear that the Land Department in deciding in favor of the defendant railway company erred as a matter of law. But if there could be any doubt about the matter it has been settled by the Supreme Court of the United States in *S. Paul, M. & M. Ry. Company vs. Donahue*, 210 U. S., 35, wherein the court construes language identical with that of the *Act of March 2, 1899*.

In the Donohue case the Court said:

"But the assumptions upon which these conclusions were based clearly disregarded the fact of the long possession by Hickey and his heir of the land during the pendency of the contest, and disregarded the previous and final ruling of the Secretary, made in February, 1903, which maintained the validity of the settlement of Hickey, and decided that, by such settlement, he had validly initiated a claim to the land. When this is borne in mind it is clear that the ruling rejecting the Donohue claim and maintaining the selection of the railway company was erroneous as a matter of law, since, by the terms of the Act of August 5, 1892 (27 Stat. at L., 390, chap. 382), the railway company was confined in its selection of indemnity lands to land nonmineral, and not reserved, 'and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection.—' When the selection and supplementary selection of the railway company was made, the land was segregated from the public domain, and was not subject to entry by the railroad company. Hastings & D. R. Co. vs. Whitney, 132 U. S., 357, 33 L. Ed., 363, 10 Sup. Ct. Rep., 112; Whitney vs. Taylor, 158 U. S., 85, 39 L. Ed., 906, 15 Sup. Ct. Rep., 796; Oregon & C. R. Co. vs. United States, 190 U. S., 186, 47 L. Ed., 1012, 23 Sup. Ct. Rep., 673."

St. Paul, M. & M. R. Co. vs. Donohue, 210 U. S., 35; 32 L. Ed., 949.

But there is another theory under which the appellee is entitled to recover in this case. It has been repeatedly

decided by the Federal Courts, including the United States Supreme Court, that patents issued by the Land Department for lands which have been previously granted, reserved from sale, or otherwise appropriated, are void. The reason being that the executive officers of the Land Department are without authority to act in the matter under the law invoked by the party seeking the patent in such case. Unless the lands for which patent is asked are within the class designated in the statute invoked as authority for the issuance of the patent the Land Department is without jurisdiction to act in the matter. For this reason it may even be shown in an action at law that the patent is void.

Morton vs. Nebraska, 88 U. S., 660; 22 L. Ed., 639;
Hannibal & St. Joe Ry. Co. vs. Smith, 76 U. S., 83;
 19 L. Ed., 599;
*Burlington & Missouri River Ry. vs. Freemont
 County, Iowa*, 70 U. S., 567; 19 L. Ed., 563;
Lake Superior Ship Canal R. & I. Co. vs. Cunningham, 155 U. S., 354; 39 L. Ed., 183;
Burfening vs. Chicago, St. P., M. & O. Ry. Co., 163
 U. S., 219; 41 L. Ed., 175;
Mister vs. Crommellin, 18 How., 88; 15 L. Ed., 279;
Reichart vs. Phelps, 6 Wal., 160; 16 L. Ed., 149.

If the patent to the lands in suit is void for want of jurisdiction on the part of the Land Department as held by the foregoing authorities, then the appellee is entitled to the relief prayed for. In any event the appellee has

shown that the Land Department committed an error of law upon the state of facts shown in the record here. In order that the lieu selection of the defendant Northern Pacific Railway Company could attach to these lands upon the cancellation of the claim of the State of Idaho, and become a prior and superior claim to the claim of Beldon M. Delany, who was then a settler upon the lands, or in other words, that the lieu selection of the defendant Railway Company might take effect as of the date of the cancellation of the claim of the State of Idaho, all of the conditions must have then existed which were necessary to enable it to make an original valid lieu selection as of that date, and this the company could not do for the reason that the record shows that Beldon M. Delany was then a settler upon the land.

In other words, *when the claim of the State of Idaho was cancelled on June 28, 1915, Delany was then in possession of the land, residing thereon and had duly made his application to enter the same under the homestead laws of the United States, and the lands were not "vacant and unoccupied," and "lands to which no adverse right or claim had attached or been initiated," at the time of the cancellation of the State's right, and hence were not subject to selection by the Railway Company.*

Thus we see that for over twelve years Delany maintained his actual settlement upon the land and his right to the land, under and pursuant to the then current decisions of the Land Office. That is, if the law had continued to be construed and interpreted the same as it was

construed and interpreted by the Land Department during the twelve years of Delany's settlement, then the lands in suit would have been awarded to Delany, and yet the appellant's now ask the Court to say that the claim of the State of Idaho, which was maintained for a period of over fourteen years, during which time it was sustained by the decisions of the Land Department, and under which the State of Idaho was actually awarded lands in settlement of its claim, was not in fact the initiation of any claim at all, not even an invalid claim.

We cannot agree with appellants' statement of the record with respect to the application of the State of Idaho for survey, wherein on pages 49 and 50 of their brief they say:

"On July 30, 1909, after the filing of the township plat of survey in the local land office, application was made in the name of the State of Idaho to select this and other land in the township, under the indemnity provisions of the State school land grants, in lieu of certain designated sections 16 and 36 alleged to have been lost to the State by reason of their inclusion in forest reserves. The proffered selections were rejected, and the rejection affirmed by the Secretary on appeal. It was held that the application for survey made by the State under the Act of August 18, 1894, never became effective, and that the State acquired no preference right thereunder. And it was further held that even should it be conceded that the State had a preference right of selection, nevertheless under the constitution and laws of Idaho, as construed

by the Supreme Court of that State, the representatives of the State were without authority to make selections in lieu of the bases tendered; that an act of the Legislature of Idaho, passed February 8, 1911, had no retroactive effect; and that the proffered applications to select were in and of themselves unauthorized and void.

"It was also held that neither the application for survey, nor the attempt by the officers of the State to select the land in July, 1909, in any manner prejudiced or affected the validity of the Railway Company's selection of July 23, 1901; that that selection was in all respects regular and valid, and entitled the Company to the land; and that as Delany's settlement was made two years after selection by the Railway Company, he acquired no rights thereunder. As already stated, the State acquiesced in the decision and is out of the case."

The only thing in the record pertaining to this matter is a letter from the Commissioner of the General Land Office to the United States Surveyor General of Idaho, in which he requests the Surveyor-General of the State to procure a report from the Governor of the State of Idaho as to whether or not the State could not satisfy its grant out of lands already reserved. In which letter the Commissioner expressly states that "Pending the receipt of the report of the Governor *no action will be taken* in the matter of withdrawing from further disposal the lands," etc. (See Record, pages 81-82.)

It is true that the Commissioner on July 16, 1914, or thirteen years later, says in rejecting the State's application:

"That on July 19, 1901, the Commissioner refused to withdraw the townships in question upon the ground that the areas embraced in previous withdrawals were sufficient to enable the State to satisfy its several grants."

It is this loose handling of old records by the Commissioner of which we complain. Can the Commissioner, by merely asserting the fact, make black really white? Is it any wonder that the court is asked to review a record which discloses such gross carelessness in the handling of facts? (See Record, pp. 86 to 97.) In this connection we desire to call the court's attention to the fact that in this very decision of the Commissioner, and on page 81 of the record, he says:

"It was held that pending the receipt of a report from the Governor, no further action would be taken on the application for withdrawal," etc.

And again on page 92 of the record he quotes from a decision of the Department, holding:

"That the withdrawal for the benefit of the State did not attach until July 15, 1901, the date the application was received in this office (G. L. O.), and was not a bar to the reservation of the lands for forestry purposes," etc.

This statement of the Commissioner is also made in the face of the further fact that the lands in question were actually withdrawn under date of January 20, 1905, after

the State had deposited the necessary cost of survey.

It is this statement which seems to have misled the trial court, and a careful reading of his opinion will show but for this statement in the record the learned trial court would have reached a different conclusion.

Under another sub-division of appellant's brief they adopt as the settled and conclusive record in this case the statement of the record which they have theretofore "constructed," which in its final analysis is a conclusion of fact. Of course if they are permitted to use this statement as the record in the case, it would harmonize with their argument. Reference is made to the statement of appellants with reference to the assumption of the trial court that the Department rejected and disallowed the application for survey. We contend that the record shows that no such action was taken, as it was not taken at the time. *The reference in a ruling of the Department thirteen years later contrary to the record does not change the fact. Hence all of the argument of appellants with respect to the jurisdiction of the Commissioner, and this ruling of the Commissioner becoming final by reason of no appeal being taken, is, in our opinion, entirely beside the question, and has no foundation of fact upon which it can rest.*

Counsel seem to lay great stress and put great store on the statement that while the earlier decisions held the application of the State to be valid and binding, it was subsequently found that these decisions were due "partly

to failure to give due consideration to the facts surrounding the application for survey, and partly to an erroneous view of the functions and authority of the Commissioner in proceedings under the Act of 1894." While the facts really are that the later decisions referred to by counsel, and the decisions which did give due consideration to the "functions and authority of the Commissioner in proceedings under the Act of August 18, 1894," were all rendered and made *after the State of Idaho had no longer any interest whatsoever in this application, and after the State had selected the full quantity of land which it was entitled to select.* Then the Commissioner of the General Land Office, by reading into the record as of a date thirteen years prior thereto, made this wonderful discovery, that his predecessor in office had failed to give "due consideration to the facts surrounding the application for survey."

The Prior Right of Delany.

In the case of Cowles vs. Huff *et al.*, 24 L. D., 81, Secretary Francis, after full consideration, in an elaborate decision overruled a line of cases beginning with that of Henry Gauger, 10 L. D., 221, and sustained the doctrine of the decision in Allen vs. Price, 15 L. D., 424. In the case of Stewart vs. Peterson, 24 L. D., 575, cited in your decision, Acting Secretary Ryan, stating that under the first rule adopted in the case of Cowles vs. Huff, *supra*, no rights either inchoate or otherwise, are acquired to

lands involved in a pending contest, by an application to enter filed before the rights of the entryman have been finally determined, modified the rule so as to cover what he termed "a hictus between the time when the former entryman's rights are finally determined and the beginning of the period accorded a successful contestant within which to make entry," and directed the preparation of a circular prescribing the directions contained in the decision. This decision was dated June 14, 1899, and on July 14, 1899 (29 L. D., 29), this Circular was issued and is as follows:

"In accordance with departmental instruction in the case of John Stewart vs. Minnie S. Peterson (28 L. D., 515), it is hereby directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been cancelled upon the records of the local office. Thereafter, and until the period accorded a successful contestant has expired, or he has waived his preference right, applications may be received, entered and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contestant or upon the filing of his waiver of his preferred right."

Now, it is clear if this circular applies to any cases except contest (about which more hereafter), the application of the railway company should have been rejected when the State's selection was made. It could be con-

sidered only after the expiration of the preference right period or the waiver by the contestant.

What was the effect of the selection by the State in the case at bar within the preference right period? That it segregated the land and is the equivalent of an entry there can be no doubt. Southern Pac. Ry. Co., 32 L. D., 51, approved in the case of Weyerhauser vs. Hoyt, 210 U. S., 380. It follows that when within the preference right period the State filed its selection of the land in controversy, which was accepted by the Land Department, *it was the duty of the Department to reject and cancel the railroad selection.* That it was not done is the fault of that Department and the settler cannot be deprived of any of his rights because of this failure. Ard vs. Brandon, 156 U. S., 524.

If it be conceded, as we are quite sure it must be, that the railroad application should have been cancelled when the State's selection was filed and that its selection after survey gave it no right, *what was the legal effect* of the acceptance of the State's selection regular upon its face, as it affected the railroad claim?

If the circular referred to can be applied to this case, then the State must be treated as a contestant. It would not be insisted that after the contestant exercised his preference right and made entry, the railroad selection, a second applicant to contest, would be longer a valid claim. It has been held that where at time of selection by the company, the land was occupied by a settler, it was excepted, and even though afterwards abandoned, the selection did not attach. 37 L. D., 193 and 502.

In the case of Leete vs. N. P. Ry. Co., 37 L. D., 37, the Department held (Syllabus):

"The allowance of an entry upon an application pending at the time of the presentation of a railroad selection for the same land is *in effect a rejection of the proffered selection, and cancellation of entry does not operate to revive the application to select*, although never formally rejected, to the prejudice of the rights of an adverse claimant."

(*The italics are ours.*)

The case of Swanson vs. N. P. Ry. Co., 37 L. D., 74, cited in the decision, is not in point for the reason that, in that case as stated, "the State made no attempt to exercise its preferred right of selection and there was therefore (for that reason) no bar to the consideration of other claimants the same as though such a right had never existed." But even if it be conceded this ruling would be right if applied to contest cases, it has no application to the case at bar, where a regular selection was made and accepted by the Land Department, and remained of record until 1915, and was not then cancelled because of any right of the railway company under its selection.

But, neither the decision in the case of Stewart vs. Peterson, *supra*, nor the circular issued thereunder apply to the case at bar. That decision and all those considered therein as well as the case of Cowles vs. Huff, which it modifies, and all the cases which we have found to which

it has been applied are *contest* cases. Upon its face it applies only to this class of cases and as that statute is a special one, the decision and the circular are not applicable in any other classes of cases. The Department protected the railway company against the amendment of the Forest Lieu Act of 1897, and its final repeal, upon the ground that the Act of 1899 is a special act and was not affected thereby. If that is sound law, then we insist that decisions and circulars applicable on their face to a special statute, in derogation of the general land laws should not be applied to another and different special statute, so as to *defeat a settler* under the *general homestead law*. The effect of its application in this case is to keep alive for fourteen years a proffered selection, which, because of the *special agreement between the Agricultural and Interior Departments* causes no inconvenience to the railway company but acts only to the detriment and irreparable loss of the homestead claimant.

Let us take another view of the force and effect of the departmental decision. The Department has held that both as to the application of the State for survey under the Act of 1894 and the original selection of unsurveyed land by the railway company under the Act of March 2, 1899, they acquire only a preference right and each is required to file within a limited time after the filing of plats of survey in the local office, the State a selection and the railway company a new list. The effect of this is to have two parties having a preference right at the same time for the same land. The decision also holds

that although the State exercised its preference right by making selection, the railway company instead of contesting the selection was permitted to have it held in abeyance until a settler made a twelve-year fight against the State selection, and after having won and secured its cancellation, the railway company is given a prior right to the land because of its *preference right which could not possibly have been exercised because of the State's selection.* The further effect is that the final proof made by Delany is 1909 shows his improvements were from \$1,000 to \$2,500, and as he has been residing upon, improving and cultivating the land ever since, it is but reasonable to suppose they are now worth from \$2,500 to \$3,000, all of which together with his twelve years of labor and residence is to be forfeited to the railway company which has never expended a dollar and has no equities whatever. Thanks to the agreement between the Interior Department and the Agricultural Department the railway company is not required to furnish a base, tract for tract, as the railroad companies have been required to do in the adjustment of their grants since the administration of Secretary Lamar in 1885 and the several States are also required to do, but merely refer to it as a part of the 440,000 acres conveyed to the United States under the act.

Can this be the law? If it is, it is not based on justice, equity, nor common right and should not be used to forfeit the claim of the settler with all of his improvements and his earning the land more than twice over under the

five-year homestead law and four times under the three-year law.

The Description of the Land in the Railway Selection.

However much we may disagree with the Department, we assume we must take the decision in the Daniels case, based as it was on the oral hearing in the case of Miles *et al.*, as accurately expressing the views of the Department as to a description of unsurveyed lands by the railway company under the Act of March 2, 1899. This is especially true in this case, as that decision is referred to as authority for the ruling made. Let us, therefore, analyze that decision and see just what it does hold as to the sufficiency or insufficiency of a description in the terms of a future survey, for, if the description given in this case when considered in connection with the lack of established surveys in the "immediate vicinity," or even in the "vicinity," as they are defined in the dictionaries, together with the conditions prevailing, viz., in a mountainous heavily timbered rough region of country, it certainly would not be held to protect the company against the rights of a settler who went upon the land without any notice of the claim of the company, not only before the filing of the plats of survey, or their approval by the Commissioner, but before the survey was made in the field, and of necessity therefore before the new list was filed by the company, is *not sufficient* under the rule supposed to be established in the Daniels case, or that of

Judge Dietrich, affirmed by the Circuit Court of Appeals in the West case, and can be no protection against the claim of Delany.

The decision in the Daniels case states:

"While the metes and bounds description of selected unsurveyed land should always have been, as it now is, required."

In the case of Thorpe *et al.* vs. The State of Idaho, 42 L. D., 15, decided March 22, 1913, the Department held, after reviewing the two decisions of the Supreme Court of that State, as to the right of the State Land Board to make the selections, and the confirmatory act of 1911 held:

*"This Department has never had any doubt as to the validity of these selections. * * * This difficulty has now been removed and it is not material whether the court changed its minds upon the question or whether the invalidity suggested by the court in the first instance has been cured by legislation. In either case no good reason remains why said Department decisions should not be carried into effect. They are therefore hereby reaffirmed and the necessary steps will be taken to carry them into effect."*

If not when the State exercised her preference right, surely when this decision was rendered, the Railway Company's selection should have been cancelled but was not.

Again, when the case of F. A. Hyde, 40 L. D., 284, was

decided October 6, 1911, holding that even in a Forest Lieu Selection which is entitled to a liberal construction and does not require description of unsurveyed lands "with reasonable certainty," a description in terms of future survey was insufficient and no protection against settlers. Here again it was the duty of the Land Department to cancel and reject this pending application and selection of the Railway Company, but it was not done.

Under this decision which remained the law of the Department from October 6, 1911, to March 10, 1914, more than two years and a half, all of the selections by the Railway Company under this act should have been cancelled, but they remained until it suited the pleasure of the Railway Company to ask for and obtain an oral hearing which resulted in the reversal of the Hyde case.

This court, in the case of Cropley vs. Cooper, 19 Wall., 174, laid down this general rule:

"Equity regards substance and not form, and considers that as done which is required to be done." See also Craig vs. Leslie, 3 Wheat., 518.

We have seen all the equities are with the appellee. Delany had braved the hardships and privation of years of residence and expended about \$2,500 to \$3,000 in clearing, cultivating and otherwise improving the land, as well as the expense of years of litigation.

The Railway Company did not expend a cent unless it was in litigation, and consequently to deprive it of the land would be no loss, as the purchase money (scrip)

used would be returned to it, and the increase in value would be much greater than the interest on its value at the date of filing to the present time. It has no equities.

Respectfully submitted,

S. M. STOCKSLAGER,
Attorney for Appellee.

Washington, D. C., Jan., 1921.

E. O. CONNER,
Spokane, Wash.,
Of Counsel.

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SUPREME COURT U.S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

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No. 172.
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EDWARD BUTLEDGE TIMBER COMPANY AND
NORTHERN PACIFIC RAILWAY COMPANY,

Appellants,

vs.

ALRA G. FARRELL, *Appellee.*

—
PETITION FOR REHEARING

—
S. M. STOCKSLAGER,
Of Counsel.

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INDEX

STATEMENT AND REASONS FOR REHEARING.

A, B, C, D, E, F, G, H.

Consisting mainly of erroneous statements of the contents of the record, which statements controlled the decision.

QUESTIONS INVOLVED.

- (a) Conflict between selection of Idaho under Act of August 18, 1894 (28 Stat., 394); Mt. Rainer grant to Northern Pacific Railroad Company (30 Stat., 994), and Delaney, a settler, under Act of 1880, on unsurveyed land.
- (b) Being the first construction by this court of effect of filing and giving notice required by Act of 1894 empowering the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota, Wyoming, and Utah to file with the Commissioner of the General Land Office applications for survey by townships of land to fill their grants, reserving same upon filing application from any adverse appropriation—giving such State the "exclusive" right to select any or all of the land for a period of 60 days from filing plat in the local office, the land not selected to become a part of the public domain.
- (c) Is this not a statutory reservation and beyond the jurisdiction of the Commissioner?
- (d) Whether statutory or not, could the Railway Company by a subsequent selection under the Act which confines its right of selection to public lands "not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection," gain any right whatever by such subsequent selection, made prior to the expiration of the 60-day period allowed the State to select?
- (e) If the State selected the land in due time when Delaney, the settler, who settled subsequent to the State's application and to the selection of the company, but who was living on the land at the date of the selection by the company in 1909, and also in 1915, when the State's selection was canceled, did he not have a right prior and superior to that of the Railway Company?
- (f) If, as held by the Department and the District Court, the attempted selection by the Railway Company after the filing and notice by the State should be treated as a second or subsequent contest

(if there could be one there might be any number), it follows that, as in contests, when the first contest is successful, the entry canceled and the preference right of the contestant exercised, the subsequent contests based on this canceled entry *must fall*, and the legal effect is the same as if cancellation had taken place when ordered by the Department, although not formally rejected. (37 L. D., 193) Quoting St. Paul S. M. & M. Ry. Co. vs. Donohue, 210 U. S., 521, emphasized at page 505, 37 L. D.

- (g) The timely selection by the State segregated the land and is equivalent to an entry. 32 L. D., 51, approved in Weyerhaeuser vs. Hoyt, 210 U. S., 380; Leet vs. N. P. Ry. Co., 37 L. D., 37.
- (h) The statutory reservation created by the State's application and notice and its timely selection *approved* and remaining of record until canceled June 28, 1915, effectually prevented the attaching of any claim of the Railway Company under its subsequent selection in 1901, and when it was finally canceled, Delaney was, and for 12 years had been, a *bona fide* homestead settler on the land whose right immediately attached to the exclusion of any claim of the company and related back to the date of his settlement. Nelson vs. N. P. Ry. Co., 188 U. S., 108.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

No. 172.

EDWARD RUTLEDGE TIMBER COMPANY AND
NORTHERN PACIFIC RAILWAY COMPANY,

Appellants,

v.s.

ALRA G. FARRELL, *Appellee.*

L

PETITION FOR REHEARING.

The said Alra G. Farrell comes now and respectfully petitions this Honorable Court for a rehearing of said cause for the following reasons:

1. Because of the great importance and far-reaching effect of the decision of the questions involved, it being the first construction by this court of the act of August 18, 1894, by which Congress intended to make good its solemn compact made between the United States and the great States of Washington, Idaho, Montana, North Dakota, South Dakota, Wyoming and Utah, when they entered the family of States, by liberal grants of the public lands, aggregating many millions of acres, for

school, university and other purposes, by enabling the governors of these States to have any of the unsurveyed public lands in their States reserved from all adverse appropriation from the date of filing application in the office of the Commissioner of the General Land Office for their survey, until the expiration of sixty days from the date of the filing of plats in the proper local land office within which period such States was specifically given the "*exclusive*" right to select in fulfillment of their grants such of the land as they might wish, the remainder becoming at that date a part of the "public lands."

2. Because this construction of the legal effect of the word "reserved," in the Act, as part of the wise and just intention of Congress, so clearly expressed, to carry out this compact in good faith, constituting, as we believe, the unauthorized right of the Commissioner of the General Land Office under his general powers derived from his control over the disposition of the public lands, and clearly contrary to the undoubted and undisputed purpose of Congress in enacting this statute, to "refuse to consider" and "reject" the State's application thus authorized, overruling a long unbroken line of construction of the Act by the Interior Department, over a period of thirteen years, resulting as it does in giving the land involved to the Northern Pacific Railway Company, under the Act of March 3, 1899, known as the Mt. Rainier grant, against a settler in good faith under the homestead law with a residence of more than twelve years.

3. Because this Court is without any decision of the Circuit Court of Appeals in this case on the construction of the Act of 1894, that court having rested its opinion and decision against the appellants upon the sole ground that the description by which the railway company select-

ed the land, subsequent to the State's application, in terms of future survey, situated as it is $7\frac{1}{2}$ miles from any surveyed line was not of that reasonable certainty required by the terms of the grant.

4. Because the decision of the District Court which is affirmed conceded the Act was thought to be "more readily susceptible to the construction adopted in the first decision (a statutory reservation), but in practical administration such a meaning gave rise to the most serious difficulties," because, in his view, Congress did not intend to permit the tying up and prevention of settlement of vast areas of the public lands by authorizing the Governors of these States, by their applications for survey to do so, but *did intend* that the Commissioner of the General Land Office with no right given him by the Act to do so, should censor these applications, or exercise his arbitrary unauthorized right to *reject* them entirely and thus defeat the plain terms of the statute, enacted in accordance not only with this solemn compact but with its general public policy.

5. Because of the vital errors of the decision of the District Court, affirmed and repeated by this court, that the Commissioner "rejected" the State's application for survey embracing this township, which, because of failure of the State to appeal therefrom became final and conclusive against the State's application; as well as the further statement that no "selection" of the land involved was made by the State under the survey thus authorized, when the deposition of the Commissioner and the certified copies of the proceedings by the Commissioner, made part thereof, in the transcript, show beyond any reasonable doubt that the Commissioner "did not reject," nor refuse to "recognize" the State's applica-

tion, but on the contrary, proves it was duly received, considered, withdrawal made under it, the land duly and timely selected by the State in 1909, which remained resisting all attacks of the railway company and of Delaney, the settler, until canceled June 28, 1915. Tr., pages 81-94, both inclusive, and page 118.

6. Because, construing the option accepted under Act of March 3, 1899, under which the railway selection was made—requiring strict construction—which prohibited it from selecting any unsurveyed lands except such non-mineral lands as were so classified by the surveyor at the time of survey, “not reserved and to which no adverse right or *“claim had attached or been initiated”*; the Act of August 18, 1894, giving the State the “Exclusive” right for 60 days after filing of plat of survey in the local office, where application therefor was filed with the Commissioner of the General Land Office and notice given within 30 days, to select *every acre of land subject to its grant*, within the township, if it so desired; and the Act of May 8, 1880, which gave to Delaney a vested statutory right to enter the land settled upon within the same 60 days, which the Land Department is without power to prevent, and *the record shows there never was a moment from the time said railway selection was attempted to be made, when the land was legally subject to such selection; the State claim and that of Delaney absolutely taking the land out of the category of lands subject to its grant*. It follows that the cancellation of Delaney’s application and the allowance of that of the company and patenting the land to it was illegal and wrongful. See Opinion of Attorney General Wickersham, 39 L. D., 482, dated January 30, 1911, and Decision District Court, bottom p. 143 of Transcript.

II.

That there may be no mistake about this, we here set out what the Commissioner testified was the whole of the proceedings by the Commissioner upon the State's application, as follows:

OFFICE U. S. SURVEYOR GENERAL,
DISTRICT OF IDAHO.

Boise City, July 10, 1901.

Honorable Commissioner of the General Land Office,
Washington, D. C.

Sir:

I have the honor to submit herewith an application of the Governor of the State of Idaho for the survey of the following townships:

Township 43 N., R. 4 E. * * * (And other land, describing eighteen in all).
* * *

Based upon the Governor's application, I recommend the survey of the townships stated, with the exception of the three included or to be included in awarded contracts, but it is not deemed advisable to proceed with advertising for bids until after the demands of settlers can be more accurately determined.

Very respectfully,

JOSEPH PERRAULT,

U. S. Surveyor General for Idaho.

(Endorsed as follows) U. S. General Land Office.

Received July 15, 1901.

The U. S. Surveyor General,
Boise City, Idaho.

Sir:

I am in receipt of your letter of July 10, 1901, enclosing the application of the Governor of Idaho, dated July 5, 1901, for the survey of 17 full townships and one fractional township, designated as follows:

Tps. 43, N. R. 4 E. (And other townships).
* * * * *

In reply you are requested to secure from the Governor, or the proper officer, a statement showing the *total area* of lands selected to date; also the approximate area of *all* of the townships heretofore applied for by the Governor; also to report whether or not the *total area* to which the State is entitled under the enabling act has not, or may be selected from the lands embraced in the townships heretofore applied for, the total number of which (approximately) is 206.

Pending the receipt of the report of the Governor no action will be taken in the matter of withdrawing from further disposal the lands in the 18 designated townships named in the Governor's application of July 5, 1901.

In the opinion of this office the areas embraced in the townships designated in the applications for survey heretofore made by the Governor from April, 1895, to July 1, 1901, are deemed sufficient to enable the State officers to make the requisite selections *in full*, and that the public interests will *not* be subserved by further withdrawals of lands from settlement, pending the settlement of the State's rights under the Act of Congress approved July 3, 1890, admitting Idaho into the Union, and subsequent acts.

Very respectfully,

BINGER HERMANN,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

23464-1902 Washington, D. C., February 10, 1902.
SUBJECT:

APPLICATION BY THE GOVERNOR FOR PUBLIC SURVEYS IN
IDAHO.

Hon. F. W. Hunt, Governor,
Executive Office,
Boise, Idaho.

Sir:

I am in receipt, through Hon. H. Heitfeldt, U. S. Senate, of your letter of January 25, 1902, relative

to your application under date of July 5, 1901, for the survey of designated townships in Idaho, under the provisions of the Act of Congress approved August 18, 1894 (28 Stats. 394); also calling attention to your letter of August 16, 1901, submitting report as to the status of the lands previously applied for by the State, as requested per office letter "E" of July 19, 1901.

In reply I have the honor to inform you that your letter of August 16, 1901, as also subsequent applications for survey, were duly received, and the delay in acting thereon was due to inability to definitely determine the status of the apportionment made to Idaho of the annual appropriation for surveys and resurveys of the public lands for the ensuing fiscal year.

To the end of enabling this office to increase the apportionment to Idaho of the annual appropriation for public surveys for the fiscal year 1902-1903, so as to provide for the cost of survey under said act of August 18, 1894, *supra*, I have recommended to the Department, and there has been inserted in the estimates for the surveys and resurveys of public lands for the fiscal year 1902-1903 an additional amount of \$25,000.

In the event of said additional amount being appropriated I will take pleasure in considering your application now pending for additional surveys.

Very respectfully,

BINGER HERMANN,
Commissioner.

III.

Decision of This Court.

In the decision of this court after a statement of the issues involved and the overruling of the decision of the Circuit Court of Appeals and the holding that the description of unsurveyed lands in terms of future survey is a designation of reasonable certainty even when located

7½ miles from any surveyed line, over rough, heavily timbered land, referring to the second point it is said:

"As the district designated by Idaho for survey contained very much more land than the State was entitled to select, the Land Department refused to consider the application. No appeal was taken. Upon an analysis of pertinent statutes, opinions of the Land Department and of this court, the District Court held that the mere filing of application for survey did not so far withdraw the land from the public domain as to make the railway's selection wholly ineffective; and further, that if valid for any purpose, the application merely gave an option to select, never exercised in respect of the land now in dispute. We agree with the conclusion reached; and in view of the careful supporting opinion further discussion seems unnecessary.

The decree of the Circuit Court of Appeals must be reversed and the decree of the District Court affirmed."

It will be observed that while this opinion states only that the Land Department refused to "consider" the application, the District Court not only held that it was not considered or that the Commissioner refused to recognize it, but held also that it was "rejected" by him, which we take it by your affirmance of this "careful supporting opinion" is also approved.

These terms "rejected" or "refused to consider" or to "recognize" an application, specifically provided for by statute, complying in all respects with its terms, or any other claim for that matter, have a well understood meaning in the Land Office practice as requiring some affirmative action equivalent to a decision or judgment. And under the Rules of Practice such action to be appealable to the Secretary must be a *final decision*.

To constitute a rejection of the State's application made under and in accordance with statutory authority, certain legal steps must have been taken. They are:

1. There must have been affirmative action rejecting the application, equivalent as we have stated, to a judgment.
2. To be appealable, there must have been a final rejection, such as is usually required in the courts, the Rules of Practice following them.
3. There must have been legal notice to the State of such action, with its right of appeal. (Charles B. McManus, 7 L. D., 42.)

If either of these legal steps are lacking, there can be no legitimate conclusion that the State was estopped by its failure to appeal. *The record shows conclusively that not a single one of these legal steps were taken by the Commissioner.*

There was no action which can be by any possibility construed to be a rejection of the application. It was also distinctly stated by the Commissioner that the action taken, which is claimed to have been a rejection, was *not final*, and there is no pretense there was notice of any action ever given to the State, which alone makes the holding that the State was concluded by its failure to appeal from action of which it never had any notice, clearly error of law, as "the time for appeal could not commence to run until notice had been duly given." Charles B. McManus *supra* and Red River Nat. Bk. vs. Craig (181, U. S., 558).

Waiving for the present the question of the right of the Commissioner under his general powers alone to have taken such action, it is perfectly clear while impressed with the idea that he had this arbitrary power if the facts

which he did not have and for which he wrote the Surveyor General to call upon the Governor or other proper officer to furnish him, sustained his then view, he would refuse to withdraw the land, *an entirely different proposition*, and as held by the Department could not have affected the State's rights.

The record shows, however, that he was convinced by the Governor's report that he was mistaken, and not only did not attempt to exercise this power, but apologized in his letter to the Governor, and his *only* letter to him, written February 10, 1902, seven months after the letter to the Surveyor General, acknowledging the receipt of the report from the Governor, explaining to him the delay, as he stated, was caused by his being unable to determine what amount of the appropriation for surveys could be applied to Idaho, and that he was seeking to get an additional appropriation of \$25,000, which, if he succeeded in doing, he would "*take pleasure in considering your application now pending for additional survey.*" (Italics are ours.)

IV.

Argument.

Thus, the whole structure upon which the District Court built up its decision against the State's application falls to the ground when the acid test of the acts of the Commissioner are set forth, as they occurred, and as shown by the deposition of the Commissioner in the record.

WILL THIS COURT, THEN, NOTWITHSTANDING ITS HEAVY DUTIES TAKE ONE HALF HOUR AND EXAMINE THE PAGES OF THE RECORD HEREINBEFORE REFERRED TO AND BE CONVINCED BEYOND ANY REASONABLE DOUBT THAT ITS DECISION IS BASED UPON AN ERRONEOUS STATEMENT OF THE LEGAL ACTS IMPUTED BY

THE DECISION OF THE DISTRICT COURT AND AFFIRMED BY THIS COURT AS TO ANY AFFIRMATIVE ACTION OF THE COMMISSIONER CONSTITUTING THE LEGAL STEPS NECESSARY TO CONCLUDE THE STATE BY ESTOPPEL?

What we have stated as to the inaccuracy of the proposition that the Commissioner rejected the State's application, is still further and most satisfactorily supported by the first full consideration of the act involved and the action taken by the Commissioner upon the State's application for survey of this township made by Secretary Garfield, June 27, 1907 (35 L. D., 640), wherein all of the objections, which have been urged subsequently, were taken up and considered, the Department holding (syllabus) :

"The filing on behalf of the State of an application for the survey of lands under the Act of August 18, 1894, and the publication of notice thereof as provided by the Act, operate as a withdrawal thereof, and all settlements subsequently made are subject to a preference right of the State.

Notice to the local officers of the withdrawal of lands embraced in an application of survey by the State, as provided by the Act of August 18, 1894, is intended primarily for their information, in order that proper notation may be made upon their records, and is *not essential* to the protection of the rights of the State." (Italics ours.)

After stating that notice *was* given by the Commissioner as required by the statute, it is further said:

"An inquiry was, however, instituted with regard to the withdrawals theretofore made under the statute, the purpose being to determine whether sufficient withdrawal had not already been made on account of previous applications to satisfy the sev-

eral grants to the State, and to determine, as a consequence, the necessity for further reservations by the State's application for a survey. As before stated, the authority to institute this inquiry is now disputed. *But this need be given no further consideration at this time because response was made on behalf of the State, which was evidently considered entirely satisfactory from the fact that many other applications have since been filed, respected, and notice of withdrawals issued thereon by your (Commissioner's) office."*

If the State had fully performed the conditions upon which a reservation was directed by the statute, the mere failure on the part of your office to give proper notice to the local officers or the miscarriage of such a notice, in the event that it was directed by your office, should not prejudice the rights of the State. * * *

Upon the whole, therefore, it must be held that the State had shown itself entitled to claim the preferential right of selection for a period of sixty days from the date of the filing of the plat of the survey of this township in the District Land Office, as granted by the Act of 1894." (Italics ours.)

In the light of this thorough, full and entirely satisfactory Departmental decision, rendered June 27, 1907, more than six years after the action of the Commissioner which is claimed to have been a rejection by him of the State's application, how can it be insisted that the application was "*rejected*" July 19, 1901, and in the absence of appeal by the State it became final?

But this is not all. As set out by the Commissioner in his review of the action taken on the application (Tr., p. 93), substantially the same holding was made in the case of Williams vs. the State, July 17, 1907 (36 L. D., 20), and motions for review of these decisions, dated June 4,

1908 (36 L. D., 479-481), wherein they were all affirmed by First Assistant Secretary Pierce, and the selections of the company were ordered cancelled.

Again, in Idaho vs. N. P. Ry. Co. (37 L. D., 68), July 24, 1908, Secretary Pierce held:

"The land in question is a portion of that of the survey of which the State filed its application July 8, 1901, under the provision of the Act of August 18, 1894, and the contention of the several appellants that no preferred right of selection accrued to the State by virtue thereof has already been decided by the Department favorable to the claim of the State (Thorpe et al. vs. State of Idaho, 35 L. D., 640), and as none of the matters urged in opposition thereto appear to warrant any modification or reversal thereof, *this question will not now be reopened or further considered.* (Italics are ours.)

With such confirmation of our assertion that the State's application was not rejected, upon what possible ground can it still be held the State was concluded by failing to appeal from such claimed rejection?

For some unaccountable reason the railway company's selection was still maintained, and its cancellation which was ordered by the Department, while the Commissioner had no power to do other than carry out the Departmental decision (see case John Woods, 10 L. D., 230), it was neglected, and all of these questions again came before the Department on March 20, 1911 (39 L. D., 583), when Assistant Secretary Pierce in a most elaborate decision held (syllabus):

"Selections by the Northern Pacific Railway Company under the Act of March 3, 1899, proffered subsequent to the application of the State for survey of

lands under the Act of August 18, 1894, and while the lands were reserved from appropriations adverse to the State, *are not*, upon rejection of the subsequent application by the State entitled to recognition as of the date of presentation, to the prejudice of the rights of settlers." (Italics are ours.)

This decision also again disposed of the claim that the State secured no preference right under her application for the reason that the application embraced an area largely in excess of the grant on account of which it was made, citing Thorpe vs. State on review (36 L. D., 479), which held the State was not limited to an area sufficient to satisfy its grant, in which case the reasons for such holding were stated at length; that a motion for review was filed by the company urging this and other reasons why the State gained no preference right by this application, among them, that the Commissioner of the General Land Office had specifically refused to withdraw the lands upon the application of the State. In answer to this, it was said, considering the contention and in denying the motion, the Department in a decision of October 25, 1908:

"A sufficient answer to this contention is that for the purposes of this case it is immaterial that the Commissioner of the General Land Office refused to withdraw these lands. By the terms of the Act of August 18, 1894, *supra*, under which the application for survey was made the withdrawal became effective and was an accomplished fact upon the perfection of the application, and while it remained for the Commissioner of the General Land Office to give notice of the withdrawal, the failure of that officer to do so did not defeat it. *The withdrawal was statutory and in no wise dependent on the discretion of the Commissioner of the General Land Office.* (Thorpe

vs. State, 39 L. D., 640.) This being true, and the lands being withdrawn for a special purpose, *they were not subject to selection by the railway company*, and this is true without regard to the question whether the State had previously apparently selected an excess of land to satisfy its grants.

Upon the promulgation of this decision, the railway company, through its resident attorneys, requested that before the company's lists of selections were cancelled an examination of the conditions of the grant to the State for university purposes be made. But your office, on November 7, 1908, considering said Departmental decision of October 25, 1908, on review, as determinative of the company's claim to the land in question denied the request. A similar request was again denied by your office November 19, 1908, and on that day Departmental decisions, on review, were promulgated and the company's selection directed to be cancelled as to the lands in question." (Italics are ours.)

The Department in a decision in 39 L. D., 583, said:

"But the question of irregularity in the State's application is another matter, and is now raised for the first time. The facts as they appear from the findings of your office and from an inspection of the original files and records thereof, are as follows: Under date of July 5, 1901, F. W. Hunt, Governor of Idaho, addressed a communication to the United States Surveyor General for Idaho and the Honorable Commissioner of the General Land Office, for the survey under the provisions of the Act of 1894, of certain townships therein named, among others townships 44 north, range 3 east, with a view to the satisfaction of its public land grants. This application bears evidence of having been received * * * in the General Land Office July 15, 1901. The notice

of this application for survey bears date July 6, 1901, and the duly certified sworn statement by the publisher of the weekly newspaper at Wallace, Idaho, shows that such notice was published for the full period of six weeks."

He then proceeds to show that the publication was sufficient, and that at the date the railway lists were filed the land was reserved from appropriation adverse to the State. No legal rights could, therefore, have attached under such filing. It is further said:

"The State afterwards selected the land and thereafter the question of its right thereto was one between it and the government, and that question was not complicated by the filing of intervening adverse claims, even though same were filed pursuant to and received in accordance with subsisting administrative policy. The contention made involves the consequence that in instances where, after the State's application for the survey of the township, under Act of 1894, shall have been defeated by placing the lands in a National Forest, still the railway claim would not be defeated by the creation of such national forest, and, therefore, by indirection, the superior claim of the State would be defeated by the inferior one of the Company. *Such a consequence would be wholly unfair, was not contemplated, and cannot be tolerated.* (Italics are ours.)

It is then held that settlements made in good faith prior to July 31, 1905, would be accorded priority, and upon the allowance of entry for land so settled upon, the company's selections will, to that extent, stand rejected.

It is obvious, therefore, that both the Department in its decision of March 10, 1914 (43 L. D., 168), and the District Court, were mistaken in the statements made therein

that the Commissioner rejected the application of the State when made, and that in the absence of appeal, it became final and thus closed out all the rights which could have been acquired had this not been done. It is simply impossible in view of the subsequent proceedings by the Commissioner and the Secretary as set out in these decisions, covering from 1901, when the application was presented, to 1914, a period of 13 years, without a single break, to maintain that position. It is also shown that all of the questions which have ever been raised, either in the Department, the District Court, or this court, were raised and fully considered by these decisions and the claim of the State as against the railway company's selection, fully sustained and the company's selections ordered canceled, again and again. (See 7 L. D., 42, and Leet vs. N. P. Ry. Co., 37 L. D., 37.)

V.

The Commissioner Without Any Power to Reject State's Application.

In view of what has gone before, it is hardly necessary to discuss this question, for the reason that he made no attempt to reject it in this case. That the reservation provided for in the Act of 1894 upon the filing by the State of application for survey, and it may be giving the notice required of him, creates a statutory withdrawal or reservation is in effect conceded by the District Court in its decision. It is so held by all of the Departmental decisions except the one in 1914 (43 L. D., 168).

This court has also held that the statute prohibiting further proceedings by the Land Department in cases where no contest or protest was filed within two years after the issuing of final certificate, is statutory and beyond the reach of the Land Department. It is also held

by this court that in selections by railway companies and others authorized to make them, where the land is subject thereto and everything that the statute requires has been done, such a vested right is created that title cannot be denied. The court is familiar with the decisions, and especially the recent ones on this question, and we need not refer to them here.

But, the learned District Court after admitting that the language of the Act of 1894 was thought to be more readily susceptible to that construction, adopted by the Department, holds it cannot be sustained because in practical administration such a meaning would give rise to the most serious difficulties. He then proceeds to point out the only one upon which he relies, which is one that had been considered by the Department from the beginning, and many times held to be without force, viz., the great danger that the States would withdraw vast tracts of public lands, largely in excess of their needs, and thus prevent the settlement of the public lands, which could not have been contemplated by Congress in the enactment of the legislation. Is his reasoning logical? This view is based solely upon the theory that Congress, if it had known what it was saying, would not have entrusted the Governors of the States mentioned with this great power, but that the Commissioner of the General Land Office, without any authority under the Act and only because of his general powers, was intended by Congress to be clothed with such superior knowledge, patriotism and public spirit as to place a check upon the improvident governors of these States, who it will be generally conceded, were more largely interested in the settlement of the public lands in their States, than could be the Commissioner.

The records of the Land Department, the history of the execution and administration of this statute from its date to 1914, a period of 13 years, proves beyond any kind of doubt that this theory of the District Court is purely imaginary. This is demonstrated by the fact that these records (which the court has a right to consider, 152 U. S., 211; 138 U. S., 573), show that the Commissioner in no single instance, in this case, or any other, ever attempted to reject, refuse to recognize or consider any application made by any one of the governors in the seven States involved. Will it be contended that notwithstanding such administration for 13 years, during which it is probably true that these States succeeded in obtaining a large per cent of the lands to which they are entitled, such an administration of the Act involved the deplorable consequences pictured by the learned District Court in his decision? We apprehend no one will make such claim. It follows that there is absolutely nothing whatever in this objection, but on the contrary, it is exactly what was intended by Congress, as demonstrated by the Act of 1894 following that of 1893, which latter Act made a blanket withdrawal from the date of the filing of plat of survey in the local office, for the benefit of the State, of all lands surveyed without any action whatever by the State. But one year's practical operation convinced Congress that this was not a sufficient protection to the States in the filling of their grants for the reason that in many cases the most valuable public lands were settled upon, or selected by the railway companies and others before the plats of survey were filed, thus depriving the States of the valuable aid intended. What then could have been the purpose of the Act of 1894, except to prevent this by making an absolute, statutory reservation of all lands to

be embraced in an application for survey from the date it was *filed with the Commissioner*, whether he withdrew the land or not? This question was submitted to the Department of Justice on two occasions, and in the last opinion, by Attorney General Wickersham, January 30, 1911, set out in 39 L. D., 482, it was said:

"It is the preferential right of selection arising with the application which alone lends color to the effort to characterize it as a filing. (This involved the question whether the application prevented the taking of the land for a forest reserve.) But that is essentially a right to forestall new claims of others until the sections shall have been identified and the State shall have had its opportunity to examine them, satisfy itself in regard to their value, and applicability to its grants, and thereupon make such selections as it may deem advisable. It does not carry with it any obligation to make any selection, nor any presumption that any of the sections when ascertained would prove to be free from prior claims, or of the character of land, which the State is authorized to select. Some or all of the lands may turn out to be mineral lands. Some or all may have been previously settled upon or otherwise appropriated. Yet the application for survey will have covered all of them—those which lie beyond the reach of the State as well as those which when identified it may lawfully acquire if it choose to do so. * * * It is not of course to be assumed that the States would deliberately abuse such a power."

The same view was, perhaps more fully expressed by Acting Secretary Ryan in *Kay vs. State of Montana*, September 27, 1905 (34 L. D., 139), as follows:

"Under the Act of 1893 the State is given a preference right for 60 days after the filing of the town-

ship plat of survey within which to make its selections as against all except settlers. The practical operations under the Act undoubtedly disclosed that prior to and pending the survey in the field, many of the best tracts were settled upon and so were lost to the State, and it was obliged to take the inferior lands, thence the Act of 1894 was passed, to enable the State to ask for the survey and have the lands *reserved from settlement from the date of application*, thus giving the State an *enlarged opportunity* to secure the selection of lands under its grants, and that was the *undoubted purpose* Congress had in view in passing it. If it be held that said Act abrogated and repealed the Act of 1893, then the State has no preference right of 60 days after the filing of the plat of survey within which to make its selections, in any township wherein it has not applied for the survey, published timely notice thereof and secured the withdrawal of the land from settlement or other adverse appropriation." (Italics are ours.) See *McFarland vs. Idaho*, 32 L. D., 107.

The Secretary then holds the Act of 1894 did not repeal the Act of 1893, under which the State still had and has a preference right for 60 days to select any lands which may have been surveyed without taking any steps therefor.

It would seem to follow from these opinions and decisions as well as the uniform practice of the Department from the date of the Act of 1894 until March 10, 1914, that Congress *did* intend to do exactly what the plain, unambiguous, clearly stated language provided in carrying out its compact with the States, and obviously, the opinion of the District Court to the contrary notwithstanding, did *not* intend that the Commissioner, or any other official, should prevent the States mentioned from obtaining what it had solemnly promised. Under any circumstances

the courts hesitate to hold Congress did not intend to do what its plain language imports, and in a case like this where it is so clearly in harmony with its general policy and its solemn promise, and no bad results can be shown in its 13 years so construed, we can hardly see any reasonable ground for sustaining this view, and must most respectfully, but earnestly, request the court, especially as this is the first construction of this feature of the Act of 1894, which has been decided by this court; that, too, without the aid of the views of the Circuit Court of Appeals upon it, to reexamine and reconsider it. *Ex parte Jordan* (94 U. S., 4 Otto, 248, and Daniels vs. Wagner, 237 U. S., 547; and Rogers vs. U. S., 185 U. S., 86).

VI.

One other point in the decision of the District Court is worthy of attention, and that is that—"Later, in January, 1905, it seems that as a result of certain supplementary proceedings, the General Land Office recognized the preference right of the State and withdrew the lands, but only from January 20, 1905." Turning now to pages 130-132 of the Transcript, we find the Commissioner under said date of January 20, 1905, pointing out these "supplemental proceedings," which consisted *only* of the State's deposit December 20, 1904, of \$20,000 under the Act of 1894, accompanied by a copy of the notice for survey dated July 6, 1901. As to the publication of notice, the decision of the District Court admits that it was timely made, so that this feature of it is of no importance, leaving only this claimed "supplemental proceedings," as the deposit by the State, as authorized by the Act, of money for making the survey, and in accordance with the Commissioner's letter of February 10, 1902, to the Governor, as being the cause of delay in acting upon his application.

With due deference to the learned District Court, we must say that having held the Commissioner rejected the application of the State in 1901, which, for lack of appeal, became final and operated as an estoppel of the State, it found itself in a difficult position to account for the withdrawal by the Commissioner more than four years thereafter of land under this rejected and closed out application of the State. We hardly think he was happy in getting this dead application which had slept for four years into such activity as to induce the man who had rejected it to resurrect and carry out its provisions. But it was done, and we can now only invite attention to it.

VII.

What shall we say as to the assertion by the decision of this court that the option to select in this case was "never exercised in respect to the land now in dispute"? Turning to page 88 of the Transcript, containing a part of the deposition of the Commissioner and reciting the proceedings upon this application, that of the railway company and of Delaney and other settlers, it is said:

"The records of this office show the following selections and homestead applications in conflict with the company's selections first herein described: State Indemnity School List 02604, covering all of Section 20, filed July 30, 1909, and approved August 19, 1909. * * * The township here involved is also noted on the tract book as withdrawn under the Act of August 18, 1894 (28 Stat., 394), by letter E January 20, 1905, said withdrawal being based upon the Governor's application dated July 5, 1901."

Turning now again to page 113 of the Transcript, we find that under date of June 28, 1915, the Commissioner of the General Land Office canceled this State's list 02604 covering the land involved.

How then can the statement of the fact that no selec-

tion was ever made of this tract by the State be reconciled with the proceedings in the Land Office and the Department, at least from 1905, admittedly by the District Court, until 1915, a period of 10 years, during which it was constantly under attack by both the railroad company and Delaney, and perhaps other settlers? The District Court seems to have had trouble in getting the closed-out application of the State so far restored as to have withdrawal made under it, but the contention that no selection was ever made requires the opposite, viz., the getting rid of or ignoring a live active selection, approved by the local officers, considered may times by the Department and finally canceled, about which there is no question of doubt, in 1915.

VIII.

We come now to the consideration of the decision of the Department in the case of Thorpe vs. Idaho, dated March 10, 1914, and reported in (43 L. D., 168) as sustaining the contention that the Commissioner rejected the State's application and in the absence of appeal, this rejection became final, and also that under the decision of the Supreme Court of Idaho, the selecting officers were without power to make the selections, upon which the Department proceeds to hold no selection was made, notwithstanding the confirmatory statute of 1911, retroactive on its face, confirming the Act of the Land Board which made the selection, holding it could not be made retroactive so as to confirm the selections which the Supreme Court had held were void for lack of power in the Board to make them, but holding that it "*had no retroactive effect and in no wise impaired the rights of bona fide settlers on the lands whose claims had attached long before.*" Whatever may be the effect of this decision its purpose is clearly shown to have been to protect settlers who had made settlement prior to its date, viz., 1911.

But, we apprehend no one will insist the company acquired such a right by filing its application subsequent to that of the State as to prevent the legislature from ratifying the selection made by the board, made retroactive on its face. This results from two well settled propositions. First, that there is no statute authorizing its selection, and it is sustained only because of a vicious practice in the Land Department in contest cases, of permitting a second application to contest, depending entirely upon the success of the first contest and his making entry within 30 days after he secures the cancellation of the entry and makes entry as provided. Second, during this time it has never been held the second applicant acquired any right whatever in the land, and if the analogy to a contest is sound, then the company could acquire no right whatever prior to the survey and the 60 days after filing of plat given the State to make selection. But the Department in this decision disregarding and failing to refer to its decision in the case of Thorpe vs. Idaho, made March 22, 1913 (42 L. D., 15), considering the decision of the Supreme Court of Idaho and this confirmatory statute of 1911, which held:

"This Department has never had any doubt as to the validity of these selections. Its concern was because of the seeming declaration of invalidity pronounced by the court. The Department did not feel warranted in patenting lands to the State of Idaho in exchange for lands which the court of highest resort in that State had apparently declared could not be relinquished by the State Land Board. This difficulty has now been removed, and it is not material whether the court changed its mind upon the question or whether the invalidity suggested by the court in the first instance has been cured by legislation. In

either case no good reason remains why said Departmental decisions should not be carried into effect. *They are therefore hereby reaffirmed and the necessary steps will be taken to carry them into effect.* In the adjustment of the State's grant, however, under those decisions, due regard will be had for the State's wishes in the matter of the protection of such equitable claims as may be, or have been, preferred by settlers who were misled by the failure of the Commissioner of the General Land Office to cause to be noted said withdrawals of the records of the General Land Office." (Italics are ours.)

In the decision in 43 L. D., *supra*, as before stated, this decision is ignored entirely, and it is based upon the statement that the selection was void as held by the Supreme Court, and evidently applying the doctrine that the railway company had a vested right, without so stating, held the State's selections were void, and although holding that settlers were protected by the confirmatory statute, this decision was used as authority for the cancellation of the State's selection followed by that of the Delaney application, and the allowance of the railway company's selection and patenting the land to it.

It seems to us the decision by Assistant Secretary Laylan in 42 L. D., *supra*, stated a sound legal proposition, to the effect that the Department was not bound by the decision of the Supreme Court of Idaho in the enforcement of the United States statute; that it was immaterial what it decided, for the reason that the Department never had any doubt of the validity of these selections, fully sustaining them, but suggesting the equities of the settlers on the land. The decision in 43 L. D. seems to go upon the principle that although the proper land officials of the State, viz., the Land Board, made

the selections in due form, because the Supreme Court of Idaho in a case decided by it, held this Board had no authority under the constitution or laws of Idaho, to relinquish the 16th and 36th sections granted to it and select other land in lieu thereof, it was void. This was followed, as before stated, by a confirmatory statute passed in 1911.

But there is another principle sustained by the decisions of the Department and the courts that would prevent the attaching of any right by the railway company to the land while the State's selection was of record whether erroneously allowed, or otherwise. In other words, it did not have to be a valid or legal selection to prevent any other appropriation of the land, particularly after it was accepted and approved by the local officers and consistently sustained prior to the decision in 43 L. D., *supra*.

In the case of Santa Fe Pac. R. R. Co. vs. California, 34 L. D., 12, Secretary Hitchcock held as follows:

"The selections were accepted by the local officers, duly entered of record, and were pending undisposed of at the time of the proffer of the selection of the railroad company, and it was because of the pendency of such selection, *and without regard to their validity*, that your office and the local officers held that the land covered thereby was not subject to selection under the Act of June 4, 1897.

This action is affirmed. Good administration requires that, pending the disposition of a selection, even though erroneously received, no other application could be accepted, nor should any rights be considered as initiated by the tender of any such application."

"It is not the validity of any claim, but the fact that such claim was made, that excludes the land from the category of public lands within the meaning of the Act in suit granting the right to select public lands." S. P. Ry. Co. vs. Brown, 75 Fed., 90; McIntyre vs. Roeschlaub, 37 Fed., 556.

It has also been held by this court that:

"If the lands were excepted from the land which the company was authorized to select as lieu lands at the time of the attempted selection, subsequent abandonment by the State restored the lands to the public domain, but no rights passed to the railroad company." Kansas Pac. Ry. Co vs. Dummeyer, 113 U. S., 629; Hastings and Dakota R. Co. vs. Whitney, 132 U. S., 357, and St. Paul M. & M. Ry. Co. vs. Donahue, 210 U. S., 35.

See also decision of District Court, bottom p. 143 of Transcript.

It will be conceded that the State has the right under the Act of August 18, 1894, to select any and every acre of land falling within the terms of its grant upon its compliance with the act in making application for survey of any township, which may fall within its boundaries, for 60 days after filing of plat of survey, in the local office, *to the "exclusion" of all persons or corporations*. How, then, can it be held its compliance with the law in its application "*is not the initiation*" as well as the "*attaching*" of a claim so as to prohibit the railway company from selecting it under its grant. And after cancellation the rights of Delaney must be preferred to any claim which the railway company could have had. In the case of N. P. Ry Co. vs. Idaho, 39 L. D., 583, at page 590, it is held:

"It has never been held by this Department in a case where the State made its selections under the Act of 1894, and in attempting exercise of its preference rights, that upon the rejection of such selections intervening adverse claims for the same lands would be recognized as of the date proffered. Specifically, it has surely never been held that the preferred selections of a railway company, under *any law*, for lands covered by valid application for survey under the Act of 1894, secured *any legal rights whatever.*" (Italics ours.)

In the case of *Moore vs. N. P. Ry. Co.* (43 L. D., 173), First Assistant Secretary Jones held (syllabus):

"Any question concerning the formality of the assertion and completion of title under settlement claims (under Act of 1880) is a matter between the United States and the settler; and the Land Department is not deprived of its jurisdiction and duty to give equitable consideration to asserted settlement claims by the tender of a scrip application for the land by one having no claim to equitable consideration."

Again, in the case of *Wilson vs. New Mexico*, First Assistant Secretary Vogelsang (45 L. D., 582), considering settlements under the Act of May 14, 1880, and the failure of a settler to file within time, held:

"In the administration of the public land system, it is a fundamental principle that the settler shall be preferred over claimants who seek to assert scrip or other rights to the public domain, and in pursuance of this principle the Department will give equitable consideration to asserted settlement claim, in the presence of a scrip application for the land by one without claim to equitable consideration."

To the same effect is the decision of this court in the case of N. P. Ry. Co. vs. Amacker, 175 U. S., 564, to which reference is here made.

When the State's selection was canceled under the decision of 43 L. D., *supra*, Delaney was a resident on the land and had been so residing for 12 years, having made his settlement in 1903, during the pendency of the State's application, and the District Court found his compliance was sufficient and that he had made application for entry within the time allowed therefor under the Act of 1880, providing for the initiation of homestead claims by settlement. Now, the only way the Department could decide against his claim was to hold that it was ruled by the decision in 43 L. D., to the effect that the selection of the State was void and the confirmatory statute could not be made retroactive, against the railway company, but ignoring the statement contained in the decision that it could not be made retroactive so as to "impair the rights of *bona fide* settlers whose settlements were made long before." It is thus seen that the Department held exactly the contrary doctrine when it canceled Delaney's entry, holding it was ruled by that case, and sustained the selection of the railway company, which could acquire no right whatever, as we have seen, whether the selection was valid and legal or not, so long as it had been accepted by the Department and remained of record. It also ignored previous decisions of the Department which held the State's rights attached in 1905, and that all settlers prior to that date acquired a superior right to that of the State. It strikes us that this is clearly error.

IX.

Touching the question of the sufficiency of the description of the land in the selection of the railway company of an unsurveyed tract $7\frac{1}{2}$ miles from the nearest sur-

veyed line, the land between being "very rough and mountainous, most of it covered with heavy timber" (Tr., p. 67), wherein this court overruled the decision of the Circuit Court of Appeals, based, as it claimed, upon its reasoning in the case of West vs. Rutledge Timber Co. & N. P. Ry. Co., and the decision of this court affirming the same (244 U. S., 90), in which case the land was $3\frac{1}{2}$ miles from the nearest surveyed line, less than half the distance; it would seem that for all practical purposes the presence or absence of any surveyed line is of little, if any, importance, for the reason that if in such rough heavily timbered country, as the evidence shows to be the case here, a tract designated by the description it will bear when surveyed, across one whole township of 36 sections, containing 640 acres each, and one-fourth the distance across another one, is of the reasonable certainty required by the Act of 1899, to enable intending settlers to locate it with reasonable accuracy, bearing in mind it is for this purpose alone the land is required to be designated with reasonable certainty. Or, is it so far removed from any line of survey that, as held by the Circuit Court of Appeals in the West case, *supra*, "it stands to reason that difficulty of setting foot on the identical tract, no reasonable being could expect another to tie back to a known survey for the purpose of identification." It has no importance so far as the railway company is concerned for it has no idea where it is located, but all it has to do is to claim the land which the surveyor marks as that selection, and after survey conform it, if necessary, while the poor settler must know whether he is on this land thus described or not. He is also required to mark his land and post it. We know of no argument with more force than a plain statement of the facts, and if the court wishes to settle this as the proper construc-

tion of the Act of 1899, this branch of the decision needs no further discussion. Unfortunately in neither the West case, or in this one, was any evidence given by surveyors, but it is wholly the impression of the court.

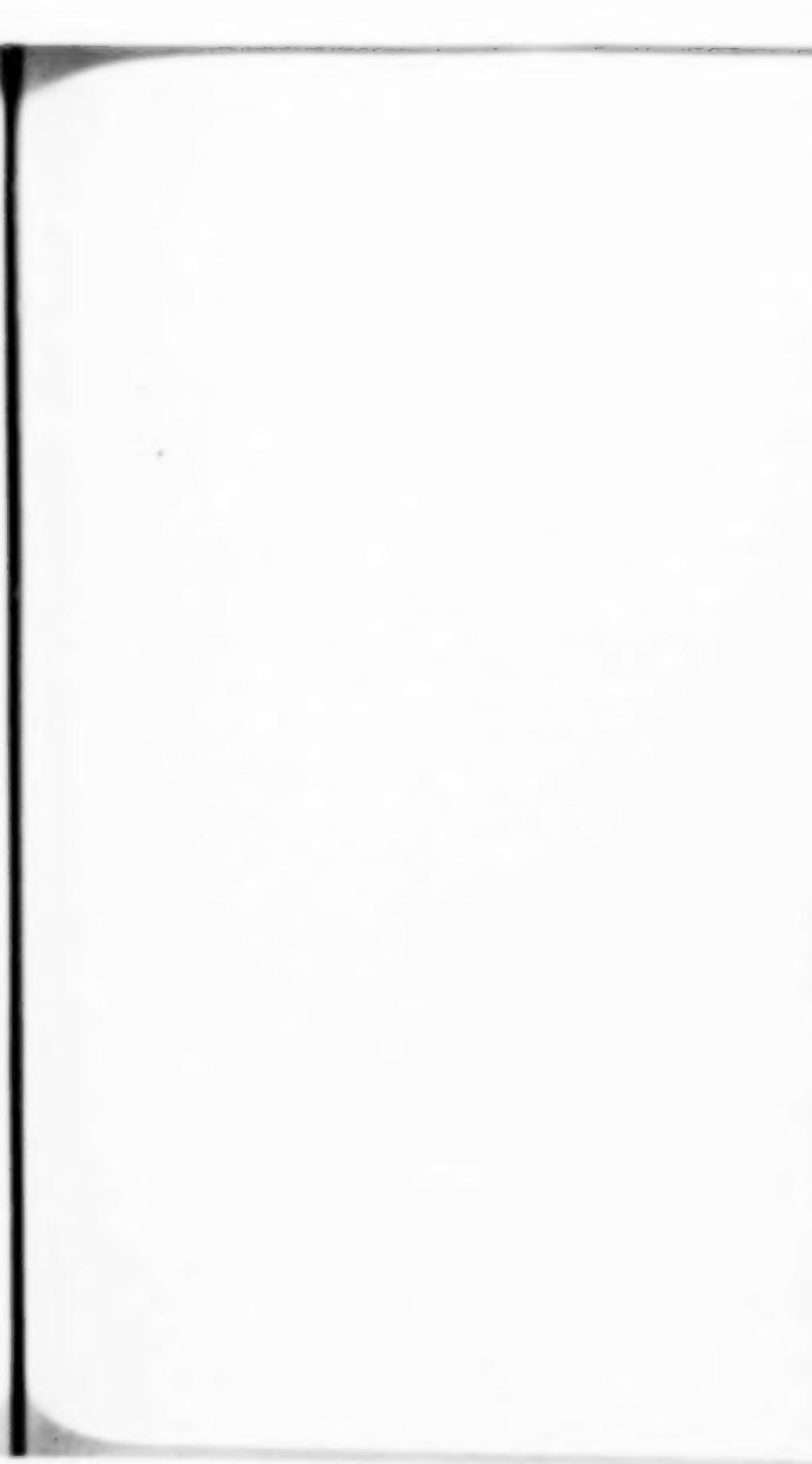
It only remains to be suggested that the State has no interest whatever in this case. Neither are we interested in any way in its behalf and it is of interest to Delaney, the settler, only to the extent that it prevented the attaching by the railway company's selection of any right to the land prior to his settlement in 1903, for, if we are right in our view, that the company could obtain no interest in the land between the filing of the application and the cancellation of its selection, it follows irresistibly that when the State's selection was canceled the rights of Delaney immediately attached to the land to the exclusion of any claim of the railway company, and that this being the case the bill should be sustained and the appellants required to hold as trustee for Delaney's successor, the present appellee.

And your petitioner prays, therefore, that an order may be made for a rehearing of the argument in this case, on a day to be appointed by this court and upon such points as the court may direct.

ALRA G. FARRELL,
By S. M. STOCKSLAGER,
Her Counsel.

I respectfully certify that I believe the grounds assigned for the foregoing petition for a rehearing are meritorious and well founded in law and fact as demonstrated by the Record.

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Washington, D. C.,
Of Counsel.



SUPREME COURT OF THE UNITED STATES.

No. 172.—OCTOBER TERM, 1920.

Edward Rutledge Timber Company
and Northern Pacific Railway Com- } Appeal from the United
pany, Appellants, } States Circuit Court of
vs. } Appeals for the Ninth
Alra G. Farrell. } Circuit.

[February 28, 1921.]

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Claiming equitable title thereto under the homestead laws, appellee's predecessor, Delany, instituted this proceeding in the United States District Court for Idaho to compel the appellants to hold certain lands, patented to the Railway Company, as trustee for him. The insistence is that patent should not have issued to the Company, notwithstanding the attempt to make selection under the Act of March 2, 1899 (Ch. 377, 30 Stat. 993), prior to initiation of any homestead right in the land, because (1) it was then unsurveyed and not designated with reasonable certainty, and (2) it was within a district survey of which had been applied for by the State of Idaho under Act of August 18, 1894 (Ch. 301, 28 Stat. 372, 394).

The District Court decided both points in favor of appellants and dismissed the bill; the Circuit Court of Appeals held against them on the first but did not consider the second point. 258 Fed. 161.

The facts pertinent to the first point are substantially the same as those presented by the record in *West v. Rutledge Timber Co.*, 244 U. S. 90, except that here the land was $7\frac{1}{2}$ miles from any known survey while there the distance was $3\frac{1}{2}$ miles. The Land Department found the description sufficient for reasonable certainty and we see no adequate ground for disregarding that conclusion.

As the district designated by Idaho for survey contained very much more land than the State was entitled to select, the Land Department refused to consider the application. No appeal was taken. Upon an analysis of pertinent statutes, opinions of the Land Department and of this court, the District Court held that the mere filing of application for survey did not so far withdraw the land from the public domain as to make the Railway's selection wholly ineffective; and further, that if valid for any purpose, the application merely gave an option to select, never exercised in respect of the land now in dispute. We agree with the conclusion reached; and in view of the careful supporting opinion further discussion seems unnecessary.

The decree of the Circuit Court of Appeals must be reversed and the decree of the District Court affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.